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No.....

In the Supreme Court of the United States

OCTOBER TERM 1982

CHEVRON U.S.A. INC., a corporation,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. In view of the fact that the Court of Appeals for the District of Columbia is the only Circuit Court that can review nationally applicable regulations promulgated by the Environmental Protection Agency, should this Court resolve the three conflicting decisions of that Circuit which create a legal morass with respect to the use of the "bubble concept," a concept which is designed to protect the environment by treating an entire industrial plant, rather than each component thereof, as a single emissions source?

2. Did the Court of Appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency

(a) to promulgate regulations which simply conformed EPA's regulatory definition of "stationary source" to the definition set forth in the Clean Air Act; and

(b) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?*

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* Petitioners in the proceeding below were Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc.

Respondent in the proceedings below was Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency.

Chevron U.S.A. Inc. was an intervenor-respondent in the proceedings below. Chevron U.S.A. Inc. is a wholly owned subsidiary of Standard Oil Company of California, a publicly owned corporation. Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Intervenor-respondents in the proceedings below, other than Chevron U.S.A. Inc., are listed in Appendix D.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPINIONS BELOW

The opinion and the judgment of the Court of Appeals for the District of Columbia Circuit, dated August 17, 1982, is printed in Appendix A ((D.C. Cir. 1982) 685 F.2d 718). The orders on denial of rehearing en banc are printed in Appendix B.

JURISDICTION

The opinion and the judgment of the Court of Appeals for the District of Columbia Circuit were filed and entered on August 17, 1982 (Appx. A), and its orders denying rehearing were filed and entered October 27, 1982 (Appx. B). This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves §§ 110, 111, 171, 172 and 173 of the Clean Air Act (42 U.S.C. §§ 7410, 7411, 7501, 7502, 7503), the pertinent provisions of which are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner, *CHEVRON U.S.A. INC.* ("Chevron"), produces, refines, and markets petroleum products. Chevron has spent several hundred million dollars in planning and initiating construction of a modification to its refinery in the San Francisco Bay Area, which may be seriously impeded and stalled if the ruling below is allowed to stand. Chevron's project will *decrease* emissions of all air pollutants from the refinery, generate 1,200 construction jobs and 45 permanent jobs, and produce in excess of $4.5 million in additional yearly tax revenues to the affected city and county. Chevron's project is an example of the many projects which will be adversely affected by the ruling below.

The Clean Air Act establishes a comprehensive Federal-state program to control existing and new sources of air pollution (Appx. A, p. A-4). Pursuant to the Act, the Environmental Protection Agency ("EPA") has prescribed national ambient air quality standards and required all states to adopt, and submit to EPA for approval, State Implementation Plans for attaining those standards. (Appx. A, pp. A-4 to A-5).

The 1977 amendments to the Clean Air Act mandated that the states establish permit programs "for the construction and operation of new or modified major stationary sources" in nonattainment areas, that is, areas which have not yet met the national ambient air quality standards (Appx. C, p. C-28; 42 U.S.C. § 7502(b)(6)). Under the 1977

Clean Air Act Amendments, no permit may be issued unless the state has demonstrated to EPA that its implementation plan assures reasonable further progress toward meeting Federal standards in the nonattainment area in which the proposed source is located (Appx. A, p. A-8; 42 U.S.C. § 7503(4)). If the nonattainment area has no EPA-approved plan, there is a construction moratorium—no major stationary source may be constructed or modified in the area if its emissions will cause or contribute to a violation of ambient standards (Appx. A, p. A-8; 42 U.S.C. § 7410(a)(2)(I)).

On October 14, 1981, EPA adopted a plantwide definition of "stationary source" for nonattainment areas (Appx. A, p. A-11; 46 Fed.Reg. 50766 (Oct. 14, 1981)). Under that definition, a "stationary source" is defined as "any building, structure, facility, or installation," which refers to an entire plant (40 C.F.R. §§ 51.18(j), 52.24(f); 46 Fed.Reg. 50771 (Oct. 14, 1981)).[1]

Under the plantwide definition, a modification would be subject to the construction moratorium or permitting requirements for "major stationary sources" only if the net emission increase from the plant as a whole is above the statutory or regulatory tripwires (Appx. A, p. A-11, n. 26). Modifications which did not increase plantwide emissions above de minimis levels would not be treated as "major modifications" (Appx. A, p. A-11, n. 26). The EPA plantwide definition thus applied the "bubble concept"—an entire plant and its emissions may be viewed as if placed under one bubble (Appx. A, p. A-2, n. 1). Under the bubble concept, air pollution regulations focus on the net effect of changes

1. Previous EPA regulations, repealed on October 14, 1981, had defined "stationary source" to also include each individual piece of equipment at a plant (45 Fed.Reg. 52,746 (Aug. 7, 1980)).

in an entire plant, rather than inspection of each individual unit or piece of equipment within a plant (Appx. A, p. A-2, n. 1).

EPA adopted a plantwide definition of "stationary source" in nonattainment areas for two reasons (Appx. A, p. A-11). First, regulatory complexity would be reduced because the same plantwide definition of stationary source has previously been held to lawfully apply in another program administered by EPA under the Clean Air Act (Appx. A, p. A-11). Second, and more important, the plantwide definition would comply with Congress' mandate that states have the primary responsibility for pollution control, because the plantwide definition allows states greater flexibility in developing nonattainment programs (Appx. A, pp. A-11 to A-12). The bubble concept affords the states flexibility by freeing the enormous time, money and other regulatory resources which would otherwise be required to inspect and issue permits for each and every component of industrial plants (and perhaps every piece of new or modified industrial equipment) in the area. Thus, for example, in a state like California where automobile emissions rather than stationary source emissions are the critical air pollution problem preventing attainment, the bubble concept allows the state to focus resources on automobile emission control, while efficiently limiting net pollution increase from industrial plants below de minimis levels set by regulation and statute (see infra, p. 12).

Respondents Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc. filed a petition for review of the October 14, 1981 EPA regulations (Appx. A, p. A-12). Chevron and various other members of the industrial community intervened in support of the regulations (Appx. A, p. A-12).

The court of appeals vacated EPA's revised regulations, holding that the bubble concept is *per se* inconsistent with the Clean Air Act's nonattainment programs (Appx. A, pp. A-16 to A-18). The court of appeals announced a "bright line test"—based on two cases, *Alabama Power Co.* v. *Costle* (D.C. Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C. Cir. 1978) 578 F.2d 319—for determining the propriety of EPA's use of the bubble concept: The concept would be mandatory in programs designed to maintain existing air quality, but per se inappropriate in programs to improve air quality (Appx. A, p. A-16). The court of appeals concluded that the bubble concept was per se inappropriate in the case at bar and considered it unnecessary to determine whether the regulations in question promoted the improvement of air quality or whether the bubble concept was consistent with the language and legislative history of the Clean Air Act (Appx. A, p. A-19).

On October 27, 1982, the court of appeals denied a petition for rehearing; Judge MacKinnon voted to grant a rehearing en banc (Appx. B).

REASONS FOR GRANTING CERTIORARI

This case presents questions of critical importance to the present and future regulation of air pollution which only this Court can resolve and thereby rescue both the regulators and the regulated from the legal quagmire created by the Court of Appeals for the District of Columbia Circuit. Under § 307(b)(1) of the Clean Air Act (42 U.S.C. § 7607(b)(1)), the Court of Appeals for the District of Columbia is the only circuit court that can review nationally applicable regulations promulgated by the Environmental Protection Agency. Thus there can never be a con-

flict between the circuits. Yet a line of decisions of the D.C. Circuit, including the one at bar, are so in conflict as to create havoc throughout the Clean Air Act.

In the case at bar, the court of appeals erroneously held that *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir. 1978) 578 F.2d 319 establish a "bright line" test for determining the propriety of EPA's use of the "bubble concept," asserting that:

> "The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to improve the quality of the ambient air" (Appx. A, p. A-16).

However, it is widely acknowledged, except by the court below, that *ASARCO* and *Alabama Power* are irreconcilably in conflict:

> "*ASARCO* and *Alabama Power* reach opposite conclusions, *interpreting an identical definition* of source but coming to completely different determinations about the validity of the bubble concept. No clear reason emerges from the opinions to explain the differences. Because the D.C. Circuit failed to reexamine *ASARCO* in light of its conclusions in *Alabama Power*, and instead tried to distinguish it, the two decisions leave no clear holding on the validity of the bubble concept" (An Overview of the Bubble Concept (1982) 8 Colum.J.Envtl.L. 137, 151; emphasis added; see Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat. Resources L. 177, 215).

The test established in the case at bar further exacerbates the confusion already raging with respect to the

bubble concept. The decisions of the D.C. Circuit give no guidance to EPA, the states, the regulated community, or the environmentalists as to the circumstances under which use of the bubble concept would be appropriate with respect to the many other provisions of the Clean Air Act, not yet scrutinized, which utilize the term "stationary source."[2]

Further, the decision is wrong and if not reviewed, not only will 31 states be required to redo their plans for attainment, causing unnecessary waste of limited public resources, but the incentive of industry to modify and retire old, poorly controlled facilities and to develop effective and cost-efficient air pollution control will be reduced, to the future detriment of air quality.

I. IN HOLDING THAT THE ENVIRONMENTAL PROTECTION AGENCY HAS NO AUTHORITY TO USE THE "BUBBLE CONCEPT"—WHICH TREATS AN ENTIRE INDUSTRIAL PLANT, RATHER THAN EACH COMPONENT THEREOF, AS THE RELEVANT UNIT FOR AIR POLLUTION CONTROL PURPOSES—IN NONATTAINMENT AREAS, THE COURT OF APPEALS HAS CREATED A CONFLICT WITH ITS PRIOR DECISION, WHICH CAN BE RESOLVED ONLY BY THIS COURT.

The court of appeals barred EPA from using the bubble concept in areas with air quality below Federal ambient standards, *even though the court could not identify any provisions of the Clean Air Act which would support its decision.* The only rationale offered by the court of appeals was that its prior decisions in *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir. 1978) 578 F.2d 319 "establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept" (Appx. A, p. A-16). That bright line test, the court asserts, is as follows:

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2. See, e.g., 42 U.S.C. §§ 7411(d), 7413, 7420, 7491.

> "The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to *improve* the quality of the ambient air" (Appx. A, p. A-16; emphasis added).

In fact the decision in the case at bar directly conflicts with the court's *Alabama Power* decision, and *Alabama Power* and *ASARCO* are irreconcilable. In *Alabama Power*, EPA employed the bubble concept under the provisions of the Clean Air Act enacted "to preserve, protect, and *enhance* the air quality" in areas which have already met Federal air quality standards (42 U.S.C. §§ 7470(2), 7401(b)(1); emphasis added). That case held that the bubble concept was consistent with the relevant provision of the Act and approved EPA's use of the bubble concept. In *Alabama Power* the court of appeals approved the use of the bubble concept under provisions of the Act enacted to improve air quality, thus rejecting the approach taken in the opinion below. Moreover, the purpose for enacting the nonattainment provisions involved here was in essence the same as that for enacting the provisions involved in *Alabama Power*, i.e., "to protect and enhance" air quality (42 U.S.C. § 7401(b)(1)). To say, as the court below did, that the two programs had different purposes and therefore required different results simply strains credulity and conflicts with the plain words of the Clean Air Act.

Further, as several commentators have observed, the decision in *Alabama Power* conflicts with the court of appeals' prior decision in *ASARCO Inc.* v. *Environmental Protetction Agcy.* (D.C.Cir. 1978) 578 F.2d 319. In *ASARCO*, the majority held that EPA regulations incorpo-

rating the bubble concept were inconsistent with the Clean Air Act's provisions governing new source performance standards ("NSPS"). The *ASARCO* majority held that EPA could not define a "stationary source" of pollution as including a combination of facilities within a plant—a definition which would have broadly applied the bubble concept.

Some two years after *ASARCO, Alabama Power* held that EPA could apply the bubble concept to the prevention of significant deterioration ("PSD") provisions of the Act, notwithstanding that the term "'stationary source'" is defined exactly the same for both the PSD and NSPS provisions as a " 'building, structure, facility, or installation' " (636 F.2d 395). *Alabama Power* held that EPA could define "stationary source" to encompass an entire plant.

> "The remarkable result of the *Alabama Power* case is that, by a judicial tour de force, the judges unanimously distinguished *ASARCO* and accepted the arguments of industry and EPA that the bubble policy • • • in fact was required by the Act. Whereas in *ASARCO*, the majority had swallowed fully the environmentalists' argument that no bubble was permissible, and had castigated EPA for taking an unsupportable compromise position, in *Alabama Power*, the judges rejected the environmentalists' contentions and found that EPA had not gone far enough in allowing the bubble.
>
> "The two decisions produce an inconsistent result" (Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat.ResourcesL. 177, 215).

As to the distinctions the *Alabama Power* decision attempted to draw:

> "The four reasons given by the court simply do not add up. There is too much similarity between the

two cases for *ASARCO* to be ignored. That is not to say that the court erred in approving the bubble concept in *Alabama Power*. On the contrary, the concept's rationality seems manifest. But there remains a conflict between the *ASARCO* and *Alabama Power* decisions too important to be passed over. It is the *ASARCO* case that should have been reexamined in light of the *Alabama Power* ruling" (Landau, *Alabama Power Co. v. Costle:* An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Envtl.L. 585, 626; see 8 Colum.J.Envtl.L., supra, pp. 149-151).

It should also be noted that the opinion below does not even purport to apply those distinctions to the Clean Air Act provisions in question; instead the court of appeals now advances a new bright line test. That court's failure to adhere to the criteria followed in its prior decision in *Alabama Power* is a virtual concession that *Alabama Power, ASARCO,* and the instant case cannot be reconciled; they create a hopeless legal morass.

II. IN HOLDING THAT EPA MAY NOT PROMULGATE REGULATIONS USING THE BUBBLE CONCEPT IN NONATTAINMENT AREAS, THE COURT OF APPEALS HAS SUBSTITUTED ITS JUDGMENT FOR THAT OF THE ENVIRONMENTAL PROTECTION AGENCY ON BASIC POLICY ISSUES.

A. The Environmental Protection Agency Regulations In Question Simply Conform the Regulatory Definition of "Stationary Source" to the Definition Set Forth in the Clean Air Act.

The Clean Air Act provides no support for the ruling below. The bubble concept, and the EPA regulations implementing that concept in nonattainment areas, are entirely consistent with the provisions of the Act. Section 172(b)(6) of the Clean Air Act provides that the states establish permit programs "for the construction and operation of new or modified major stationary sources" (Appx. C, p. C-28;

42 U.S.C. § 7502(b)(6)) in nonattainment areas. For purposes of the nonattainment provisions of the Act: "The terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 111(a)(4) of this Act" (91 Stat. 746; Appx. C, p. C-28; 42 U.S.C. § 7501(4)). Section 111(a)(4) of the Act defines "modification" as: "any physical change in, or change in the method of operation of, a *stationary source* which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted" (Appx. C, p. C-27; 42 U.S.C. § 7411(a)(4); emphasis added). The term "stationary source" as used in § 111(a)(4) is itself defined in § 111(a)(3): "The term 'stationary source' means *any building, structure, facility, or installation* which emits or may emit any air pollutant" (Appx. C, p. C-27; 42 U.S.C. § 7411(a)(3); emphasis added).

The 1981 regulations in question here simply conformed EPA's definition of stationary source to the statutory provisions of the Clean Air Act by defining stationary source as "any building, structure, facility, or installation," *the precise definition in section 111(a)(3) of the Act* (see 46 Fed.Reg. 50771 (Oct. 14, 1981); 40 C.F.R. §§ 51.18(j), 52.24 (f)). The prior 1980 regulations had further defined the term "installation" as "an identifiable piece of process equipment"—a definition which appears nowhere in the Act (45 Fed.Reg. 52746 (Aug. 7, 1980)). In 1981, EPA simply repealed its prior regulations defining "installation" as an identifiable piece of process equipment (46 Fed.Reg. 50766 (Oct. 14, 1981)).

Certainly, in so conforming the definition, EPA could not have committed a per se violation of the Act as the court of appeals held. In any event, EPA acted rationally, reasonably, and well within both the terms of the Act and

its agency discretion in promulgating the 1981 regulations. Those regulations allow plant modernization or expansion to proceed in areas without EPA approved plans only if any net emission increase from the plant as a whole is below the regulatory and statutory threshold. Nothing in the Clean Air Act suggests—much less requires—that EPA should define "stationary source" so as to require permits for each individual piece of equipment in a plant.

B. The Environmental Protection Agency Regulations in Question Are In Accord with the Legislative History and Purposes of the Clean Air Act.

The uncontroverted facts and legislative history establish that the bubble concept promotes the purposes of and is consistent with the nonattainment provisions of the Act.

Congress clearly and unambiguously stated that the nonattainment provisions of the Act had

> "• • • two main purposes: (1) to allow reasonable economic growth to continue in [a nonattainment] area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford" (H.R.Rep.No. 294, 95th Cong., 1st Sess., p. 211 (1977)).[3]

Had the court of appeals considered whether the bubble concept is consistent with those purposes, the uncontroverted factual record before EPA and the court of appeals would have shown that the bubble concept will not

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3. That this is the relevant legislative history is made clear by the Conference Report; the permit program for new and modified sources in nonattainment areas was taken from the House Bill (H.R.Rep.No. 564, 95th Cong., 1st Sess., p. 157 (1977); 1977 U.S. Code Cong. & Admin. News, p. 1537).

contravene or in any way impede those objectives. The bubble concept affords the states flexibility: In some states, where automobile emissions rather than stationary source emissions prevent the state from meeting Federal air quality standards, use of the plantwide bubble concept is irrelevant to attainment of those standards.[4] The bubble concept would enable these states to reallocate their resources to automobile emission control, rather than waste limited regulatory resources on inspection and the issuance of permits for each and every piece of industrial equipment in nonattainment areas. Numerous other states are anxious to demonstrate that use of the bubble concept is fully consistent with timely attainment of air quality standards in the most expeditious and cost-effective manner.[5] But the ruling below precludes any state from using the bubble concept, regardless of whether that concept suits its needs.

Moreover, the bubble concept is consistent with Congress' goal of allowing reasonable economic growth while the states make reasonable further progress to attainment of Federal air quality standards. The bubble concept encourages modernization and expansion of industrial plants, and "reasonable further progress" is assured because the EPA regulations in question allow a state to issue construction permits for industrial plants only if the state has demonstrated to EPA that its air quality plan assures reasonable further progress toward meeting air quality stand-

4. See, e.g., comments of the Arizona Department of Health Services (Appx. (D.C.Cir.) p. 151).

5. See, e.g., comments of the California Air Resources Board (Appx. (D.C.Cir.) p. 118); Ohio Regional Air Pollution Control Agency (Appx. (D.C.Cir.) p. 122); New York State Department of Environmental Conservation (Appx. (D.C.Cir.) p. 126); Missouri Department of Natural Resources (Appx. (D.C.Cir.) p. 134); Ohio EPA (Appx. (D.C.Cir.) p. 155).

ards (Appx. C, p. C-29; 42 U.S.C. § 7503(4)). But, the ruling below prohibits use of the bubble concept even where it is expressly found by EPA and the states to be consistent with attainment of the Clean Air Act goals.

In contrast to the economic growth allowed by the bubble concept, the ruling below results in a stifling of economic growth, contrary to the express goals of Congress. The Clean Air Act requires a construction moratorium in nonattainment areas without EPA-approved plans, but the terms of the Act apply that moratorium only to "major stationary sources" with emissions increases above threshold levels established by statute. The ruling below, however, will result in a moratorium on expansions or modifications of plants with net emission increases *below those threshold levels*. By prohibiting all use of the bubble concept in nonattainment areas, the court of appeals has extended the construction moratorium to projects in which a proposed piece of equipment or unit within a plant would increase emissions, even if the expansions or modifications to the plant as a whole would not exceed statutory limits. These industrial projects will simply not be constructed if the ruling below is allowed to stand.

In holding that EPA may not promulgate regulations using the bubble concept, the court of appeals has substituted its judgment for that of EPA on basic policy issues. This Court has often recognized that the courts may not substitute their judgment for that of administrative agencies; an agency's regulation may not be upset so long as there is a rational basis for the regulation (*FCC* v. *National Citizens Comm. for Broadcasting* (1978) 436 U.S. 775). The court of appeals, however, prohibited EPA from using the bubble concept in nonattainment areas *solely because of its policy judgment that the bubble concept would*

cause unacceptable harm to air quality. But this policy judgment of the court below is contrary to the judgment of EPA and the judgment of Congress: Under the plantwide definition of "stationary source" in nonattainment areas adopted by EPA, a project would be allowed to proceed only if any net emission increase from the plant as a whole is below the maximum levels *allowed by statute.* Thus, any increase in emissions from a plant using the bubble concept is, by definition, of a de minimis amount which *Congress has found to be acceptable and consonant with achievement of attainment in nonattainment areas.* The court of appeals may not second-guess the judgment of Congress in setting the acceptable levels of emissions, nor may the court usurp EPA's judgment in fashioning regulations to meet those levels.

One commentator has already noted that the decision of the court of appeals involves a basic policy decision with far-reaching implications for the Clean Air Act:

> "The ease with which the court cut through the tangle of vague statutory provisions and conflicting precedent was, to some, as unexpected as the result. This approach enabled the court to give an unambiguous answer to the question of the legality of netting in nonattainment areas, but produced a rationale with broader implications for the EPA Emission Trading Policy. Whether the decision stands as a lasting solution to the puzzle posed by the definition of 'source' or merely provokes another solution from Congress or a higher court, it can be said that, for better or worse, it raises the focus of the debate from the legal detail to the basic policy issues at stake" (Reed, *NRDC v. Gorsuch:* D.C. Circuit Bursts EPA's Nonattainment Area Bubble (1982) 12 Envtl.L.Rep. 10089, 10095-10096).

Certiorari should be granted not to resolve these policy issues, but rather to make clear that EPA has discretionary authority to promulgate regulations addressing these issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2208

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
PETITIONERS

v.

ANNE M. GORSUCH, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY

AMERICAN PETROLEUM INSTITUTE, ET AL.,
AMERICAN IRON AND STEEL INSTITUTE,
RUBBER MANUFACTURERS ASSOCIATION, INC.,
GENERAL MOTORS CORPORATION,
ALABAMA POWER COMPANY, ET AL.,
CHEMICAL MANUFACTURERS ASSOCIATION, INTERVENORS

Petition for Review of an Order of the
Environmental Protection Agency

Argued May 21, 1982
Decided August 17, 1982

Before: MIKVA and GINSBURG, *Circuit Judges,* and WILLIAM J. JAMESON,* *Senior United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge:* This case involves a dispute between the Environmental Protection Agency ("EPA")

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

supported by industry intervenors, and petitioning environmental associations concerning EPA's application of a "bubble concept"[1] to a discrete Clean Air Act (or "Act") scheme, the new source review requirements for areas in which air quality does not meet federal standards ("nonattainment areas").[2] The controversy centers on the appropriate definition of the word "source" for the purpose of implementing the statutory scheme. Under EPA's current, bubble concept regulation, effective October 14, 1981,[3] source means an entire plant. Under the regulation previously in force,[4] an individual piece of process equipment within the plant ranked as a source. EPA changed its definition of source expressly to cut back substantially the coverage of nonattainment area new source review.[5]

In ruling upon EPA's regulatory change, we do not write on a clean slate. Our course is marked by two prior decisions in which panels of this court determined the applicability *vel non* of the bubble concept to distinct Clean Air Act programs. In *Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979), the court held EPA *must* employ the concept in the Act's Prevention of Significant Deteriora-

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1. Under this concept an entire plant and its emissions are viewed as if placed under one bubble. One then "look[s] at any change proposed for [the] plant and decide[s] whether the net effect of all the steps [taken in conjunction with the] change is to increase the emission of any air pollutant." Without the bubble concept, individual units of a plant affected by an operational change would be inspected to "determine whether any of the units will consequently emit more of a pollutant." Alabama Power Co. v. Costle, 636 F.2d 323, 401 (D.C. Cir. 1979); *see* ASARCO, Inc. v. EPA, 578 F.2d 319, 322 (D.C. Cir. 1978).

2. *See* 42 U.S.C. §§ 7410(a)(2)(I), 7501-7508 (Supp. IV 1980).

3. 46 Fed. Reg. 50766 (1981) ("1981 Regulations").

4. *See* 45 Fed. Reg. 52676, 52696-98 (1980) ("1980 Regulations").

5. *See* 1981 Regulations, 46 Fed. Reg. at 50766.

tion ("PSD") regime, a scheme designed to *maintain* air quality in clean air areas; in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the court *ruled out* application of the concept to national new source performance standards ("NSPSs") which the Act directs EPA to set with a view to *enhancing* air quality. In each case the court focused on the purpose Congress envisioned for the particular program at issue. *ASARCO* declared the bubble concept impermissible when the congressional objective was improvement, rather than simply preservation, of existing air quality. *See* 578 F.2d at 327-29; *see also id.* at 330 (Leventhal, J., concurring) (challenged regulations would contravene congressional policy contemplating that modification of a facility would bring about air quality improvement). *Alabama Power* held the concept "precisely suited" to the congressional design when the intent was "to preserve [existing] air quality," rather than to improve it. 636 F.2d at 402.

Congress, EPA does not dispute, intended the new source review requirements to operate not simply as a quality-maintaining scheme but specifically to promote the cleanup of nonattainment areas.[8] We are therefore impelled by the force of our precedent in *Alabama Power* and *ASARCO*

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8. *See* 1981 Regulations, 46 Fed. Reg. at 50769-70; EPA Brief at 27 (a "fundamental purpose of [the nonattainment program] is to enhance air quality").

During the floor debates on the 1977 Amendments to the Act, Senator Dole made the following statement comparing goals of the nonattainment and PSD programs:

> For concentrated industrial areas [the amendments] will involve an effort to clean up ambient air quality to the extent possible, while for relatively "clean" areas like Kansas, the effort will involve a reasonable approach to maintaining healthy air standards in the face of future development.

123 Cong. Rec. 18167 (1977).

to hold that EPA's regulatory change, its employment of the bubble concept to shrink to relatively small size mandatory new source review in nonattainment areas, is impermissible.[7]

I. Background

A. *The Statutory Framework*

Congress substantially redesigned the Clean Air Act in 1970 amendments[8] to better "'protect and enhance the quality of the Nation's air resources.'"[9] The amendments established a comprehensive federal-state program to control existing and new sources of air pollution.[10] Central to the new design, Congress charged EPA to prescribe national ambient air quality standards ("NAAQSs"),[11] and

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7. *See* Potomac Alliance v. NRC, ... F.2d ....., ..., No. 80-1862, slip op. at 3 (D.C. Cir. July 20, 1982) ("[m]indful of our rules with respect to the maintenance of uniformity in dispositions of like cases by different divisions of this court").

We express no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment.

8. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

9. *ASARCO*, 578 F.2d at 321 (quoting Clean Air Act § 101(b)(1), 42 U.S.C. § 1857(b)(1) (1970), and citing W. Rogers, Environmental Law § 3.1 (1977)).

10. This court has previously identified various motivations precipitating these amendments. *See, e.g., Alabama Power*, 636 F.2d at 346 (amendments were in response "to the growing perception of air pollution as a serious national problem"); *ASARCO*, 578 F.2d at 321 (amendments "were passed in reaction to the failure of the states to cooperate with the federal government in effectuating the stated purposes of the Act" and "were designed 'to improve the quality of the nation's air,' 84 Stat. 1676 (1970), by increasing the federal government's role in the battle against air pollution").

11. Section 109 of the Act, now codified at 42 U.S.C. § 7409 (Supp. IV 1980), required the Administrator of EPA to establish two sets of ambient air quality standards: "primary standards," "requisite to protect the public health," 42 U.S.C. § 7409(b)(1) (Supp. IV 1980); and "secondary standards," "requisite to protect the public welfare." *Id.* § 7409(b)(2).

required all states to adopt, and submit to EPA for approval, State Implementation Plans ("SIPs") that provide for the timely attainment of the NAAQSs.[12]

By 1976, it was clear that many regions of the country had failed to attain the primary NAAQSs within the statutory deadline, and remained distant from those national standards. In light of this shortfall, EPA endeavored to clarify, in an interpretive rule, the circumstances in which new sources of pollution would be permitted in areas where an ambient standard had not been achieved. EPA Interpretative Ruling of December 21, 1976 ("Offset Ruling"), 41 Fed. Reg. 55524 (1976); *see* S. Rep. No. 127, *supra* note 12, at 55.[13] Congress, however,

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12. The statute directed that SIPs provide for (1) attainment of primary standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan[s]" (not later than May 31, 1975, in most cases, *see* S. Rep. No. 127, 95th Cong., 1st Sess. 55 (1977)); and (2) attainment of secondary standards within "a reasonable time." 42 U.S.C. § 7410(a)(2)(A) (Supp. IV 1980). Congress further instructed the Administrator of EPA to approve a submitted SIP if the plan met the requirements of the Act, *id.* § 7410(a), and if it did not, or if no plan was submitted, to propose and implement a plan for the state. *Id.* § 7410(c)(1).

13. Under the Offset Ruling, a "major" new or modified source would be allowed to locate in a nonattainment area "only if [certain] stringent conditions" could be met. 41 Fed. Reg. at 55528. First, emissions from existing sources in the region must be reduced by an amount greater than the contemplated emissions from the proposed new or modified source. *Id.* at 55529. Second, the source was "required to meet an emission limitation which specifies the lowest achievable emission rate for such type of source." *Id.* at 55528; *see also infra* note 20. Finally, the owner or operator of the proposed source had to certify that all existing sources in the area under the owner's or operator's control were in compliance with all applicable SIP requirements or on an approved compliance schedule. 41 Fed. Reg. at 55529. A "major" new or modified source was defined as any source which had an allowable emission rate of 100 or more tons per year (1000 tons for carbon monoxide). *Id.* at 55528.

This Ruling was later amended to conform to the 1977 Amendments to the Clean Air Act and codified as Appendix S to 40 C.F.R. Part 51. *See* 44 Fed. Reg. 3274 (1979).

"[b]eliev[ed] that a statutory clarification of the question [was] needed," *id.*, and therefore added to its 1977 Clean Air Act Amendments,[14] Part D to Title I of the Act.[15]

Part D required states with nonattainment areas to submit revised SIPs not later than January 1, 1979. 42 U.S.C. § 7502 note (Supp. IV 1980). These revised SIPs must demonstrate that the primary NAAQSs will be attained "as expeditiously as practicable," but not later than December 31, 1982, or "if the State demonstrates to the satisfaction of the Administrator . . . that such attainment is not possible in an area with respect to either [ozone or carbon monoxide (or both)], . . . not later than December 31, 1987." *Id.* § 7502(a). The SIPs must also "provide for the implementation of all reasonably available control measures as expeditiously as practicable." *Id.* § 7502(b)(2). Until the NAAQSs are attained, "reasonable further progress" towards the standards must occur in each intervening year. *Id.* § 7502(b)(3).[16]

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14. The expanded nonattainment program was only one part of Congress' extensive 1977 revisions to the Clean Air Act. For detailed discussion of another major aspect of the 1977 Amendments, the PSD program, see generally *Alabama Power*.

15. Pub. L. No. 95-95, 91 Stat. 685, 745-51, codified at 42 U.S.C. §§ 7501-7508 (Supp. IV 1980). The provisions of Part D, applicable to nonattainment areas as defined by Section 107(d) of the Act, 42 U.S.C. § 7407(d), are incorporated into the requirements of an adequate SIP. 42 U.S.C. § 7410(a)(2)(I).

16. The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part [42 U.S.C. §§ 7501-7508] and section 7410(a)(2)(I) of this title and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 7502(a) of this title. 42 U.S.C. § 750(1).

At the heart of the present dispute are two features of Congress' 1977 alterations: the Part D permit program, *id.* § 7502(b)(6), and the prohibition of major new construction in nonattainment areas lacking a SIP that meets the Part D requirements ("construction moratorium"), *id.* § 7410(a)(2)(I). Part D mandates that SIPs establish a permit program "for the construction and operation of new or modified major stationary sources" in nonattainment areas. *Id.* § 7502(b)(6).[17] States may issue a permit for construction or modification[18] of a major[19] source only if four conditions are met. First, the increased emissions from the proposed source must not exceed the allowance for growth identified and quantified in the SIP pursuant to 42 U.S.C. § 7502(b)(5) or, alternatively, the applicant must obtain sufficient reductions in emissions in the nonattainment area to offset the increased emissions from the proposed source. *Id.* § 7503(1). Second, the proposed source must comply with the "lowest achievable emission rate

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17. Emissions from mobile sources, not at issue here, are regulated by Title II of the Act, *id.* §§ 7521-7574.

18. "'[M]odification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

19. A "major" new source is one "which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant . . . ." *Id.* § 7602(j). *See also* 40 C.F.R. § 51.18(j)(1)(v)(a) (1981). A "major" modification is one that results in a "significant" increase of any pollutant. *Id.* § 51.18(j)(1)(vi). The significance levels currently in force are:

Carbon monoxide: 100 tons per year (tpy)
Nitrogen Oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

Id. § 51.18(j)(1)(xiii).

(LAER).'[20] *Id.* § 7503(2). Third, the applicant must demonstrate that all other major sources in the state under its control are in compliance (or are on a schedule for compliance) with applicable emissions limitations. *Id.* § 7503(3).

Finally, no permit may be issued unless the state is carrying out the applicable implementation plan for the nonattainment area in which the proposed source is to be located. *Id.* § 7503(4). If the nonattainment area lacks an EPA-approved SIP that meets Part D's requirements, the "construction moratorium" becomes operative and "no major stationary source [that would emit the nonattainment pollutant(s)] shall be constructed or modified in [the] area." *Id.* § 7410(a)(2)(I).[21]

B. *EPA's Regulations*

Part D, dense as it is, does not explicitly define what Congress envisioned as a "stationary source" to which the permit process and construction moratorium should apply. Nor is the issue squarely addressed in the legislative history. By regulation, EPA has twice attempted to provide a clear-cut answer. The response it gave on August 7, 1980, rested on the notion that Congress intended new source review to be "an important tool in the drive towards attainment of ambient air quality standards," 45 Fed. Reg. 52676, 52697 (1980) ("1980 Regulations"); EPA therefore designed its definition to subject to review more new construction projects in areas with unhealthy air than in areas where the legislative objective was simply to prevent

20. *See* 42 U.S.C. § 7501(3) (defining LAER).

21. The statutory provision for a "construction moratorium" carries a July 1, 1979, effective date. Prior to that date, EPA's Offset Ruling, *see supra* note 13, governed construction and modification of major pollution sources. 42 U.S.C. § 7502 note.

significant deterioration of healthy air. On October 14, 1981, EPA, upon reconsideration, dramatically altered its "source" definition. This time, the agency focused on the "regulatory burdens and complexities" the 1980 definition entailed, 46 Fed. Reg. 16280, 16281 (1981), and on a "state flexibility" concern. 46 Fed. Reg. 50766, 50767 (1981) ("1981 Regulations"). To reduce the reach of the permit and moratorium requirements, EPA conformed the nonattainment area definition of source to the definition applicable, under the PSD program, in clean air areas.

1. *The 1980 Regulations.*

In its August 7, 1980, nonattainment program implementing regulations, 45 Fed. Reg. 52676 (1980), EPA defined as a "stationary source," "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." *Id.* at 52746.[22] The regulations further defined "building, structure, [and] facility" to mean, essentially, an entire plant.

22. This specification is identical to the one Congress supplied for the term "stationary source" in the context of the NSPS program. 42 U.S.C. § 7411(a)(3); *see ASARCO*, 578 F.2d at 322. EPA appropriately used the same specification, although Congress had supplied none, in identifying the constituents of "stationary source" for purposes of the nonattainment program. *See Alabama Power*, 636 F.2d at 396. However, EPA, it is not disputed, has authority to define the constituent terms of source enumerated in the statute ("building, structure, facility, or installation") in a manner that will best effectuate "the expressed purposes of the Act." *Id.* In this case, EPA has maintained throughout, the agency may select the definition "best suited to the nonattainment program." 1981 Regulations, 46 Fed. Reg. at 50769; *see* 1980 Regulations, 45 Fed. Reg. at 52697. As *Alabama Power* and *ASARCO* illustrate, different delineations may be appropriate for different statutory programs. *See Alabama Power*, 636 F.2d at 402; *ASARCO*, 578 F.2d at 327-28.

Id.[23] "Installation," however, was defined as "an identifiable piece of process equipment." *Id.* Defining "source" as both a plant and an individual piece of equipment at a plant (a "source" within a "source") is commonly termed the "dual definition." *See id.* at 52696, 52697.[24]

EPA gave two imbricated reasons for adopting the dual definition to implement Part D of the Act. First, EPA inferred from the purpose, detail, and history of Part D that Congress intended application of new source review "to the greatest extent possible." *Id.* at 52697. "The dual definition, by defining individual units as a 'source,' will bring more units in for review in areas with unhealthy air," EPA stated, therefore "use of [this] definition clearly is more consistent with Congressional intent." *Id.* Second, EPA observed that "the purpose of the nonattainment provisions is to 'positively reduce emissions,' not merely to hold emissions constant." *Id.* EPA therefore concluded

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23. EPA's precise definition reads:

> "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the following document, *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

1980 Regulations, 45 Fed. Reg. at 52746.

24. Simultaneously, EPA rejected the dual definition for the PSD program, defining "installation" in that context, along with "building," "structure," and "facility," to mean an entire plant. *See id.* at 52693 (fundamental difference in purpose of the PSD provisions (to prevent air quality deterioration) and the nonattainment provisions (to reduce emissions) requires a different approach to defining the sources that will be subject to new source review).

that the dual definition "comports with the purposes of Part D," while "use of a plantwide definition to avoid new source review would appear to be inappropriate in nonattainment areas." *Id.*[25]

The August 7, 1980, regulations contained a further provision at issue here. EPA ruled that "reconstructed facilities" at a plant would be treated as new sources rather than modifications of existing sources. *Id.* at 52744. "Reconstruction" would be presumed whenever "the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source." *Id.*

2. *The 1981 Regulations.*

On October 14, 1981, the EPA repealed the dual definition trigger for new source review in nonattainment areas and adopted a plantwide definition of "stationary source." 46 Fed. Reg. 50766 (1981).[26] Two concerns, EPA asserted, motivated this volte-face. First, regulatory complexity would be reduced for now the same definition of "source" would apply to both the PSD and nonattainment programs. *Id.* at 50767. Second, "and more important," EPA said, the

25. EPA recognized that "use of different definitions for PSD and nonattainment areas adds to the compexity of the permitting process,' but regarded this additional complexity as "outweighed by the need for a more inclusive definition of source in nonattainment areas in order to assure attainment of standards." *Id.* at 52697.

26. The practical effect of this revision was to apply the "bubble concept" to the nonattainment program. *See supra* note 1. Under this concept, only if the net emission increase from the plant as a whole is above the statutory or regulatory tripwire would the project qualify as a major new or modified source. *See ASARCO*, 578 F.2d at 322. Therefore, an operator of an existing plant could avoid the permitting process by "offsetting any increase in pollution caused by a change in the plant . . . against a decrease in pollution from other units within the plant." *Id.*

action is faithful to Congress' mandate that states "play the primary role in pollution control," for the plantwide definition of source "allow[s] states much greater flexibility in developing their nonattainment . . . programs." *Id.*[27]

EPA also deleted the requirement that reconstructed facilities, as defined in the August 7, 1980, regulations, be treated as new sources; the agency explained:

> Adoption of the plantwide definition means that the reconstruction requirement applies only to entire plants which are rebuilt. Since few if any such reconstructions are anticipated, there is little reason to retain this requirement. In addition, deletion of the requirement makes the PSD and nonattainment rules the same in this respect.

Id.

On November 18, 1981, Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc. (collectively "Petitioners") filed the instant petition for review of EPA's October 14, 1981, regulations. Various members of the industrial community intervened in support of the altered regulations.[28]

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27. On March 12, 1981, EPA announced the proposed change in the scope of nonattainment area new source review as a decision "made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress." 46 Fed. Reg. 16280, 16281 (1981) ("Notice"). EPA cited its concern that the dual definition "is excessively and unnecessarily burdensome," *id.*, but it did not then publish its concern, later identified as "more important," to increase options and flexibility for the states.

28. Some of the intervenors had petitioned this court to review EPA's August 7, 1980, regulations. Chemical Manufacturers Ass'n v. EPA, Nos. 80-1973 et al. (filed Aug. 15, 1980), *consolidated with* Nos. 79-1112 et al. (Dec. 15, 1980). On February 22, 1982, in response to promulgation of the October 14, 1981, revisions, a settlement agreement in that case was filed with this court.

II. Analysis

A. *The Bubble Concept*

As stated at the outset, the central issue confronting us is whether EPA's discretion under the Clean Air Act is sufficiently broad to allow it to apply the bubble concept to the nonattainment program. Our decision, we earlier observed, is controlled by two recent adjudications of this court determining the propriety of the bubble concept as applied to two other Clean Air Act programs. We now turn to a closer examination of those prior decisions.

In *Alabama Power* this court concluded that EPA, to act consistently with the purposes of the PSD program (Part C of Title I of the Act),[29] must apply the bubble concept to that regulatory scheme. 636 F.2d at 401-02. In reaching this conclusion the court reviewed, in light of Part C's language and its legislative history, definitions EPA had issued for the PSD program.

First, the court stated that in the absence of contrary congressional intent, the word "source" is to be defined consistently throughout the Act, as Congress defined it explicitly in Section 111(a)(3), to "mean[] any building, structure, facility, or installation. . . ."[30] Finding no contrary legislative intent with respect to the PSD program, the court held that the Section 111(a)(3) definition governed all PSD provisions. 636 F.2d at 396. Therefore, the court ruled, EPA exceeded its authority when it augmented the components of "source," for Part C definitional purposes, to embrace "any structure, building, facility, *equipment,* installation, *or operation (or combination thereof)* . . . ." *See id.* at 395 (emphasis in original).

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29. 42 U.S.C. §§ 7470-7491 (Supp. IV 1980).

30. *Id.* § 7411(a)(3).

However, the court further ruled that EPA has discretion to define, by regulation, the four components of the word "source" (building, structure, facility, and installation) "to carry out the expressed purposes" of the program at issue. *See id.* at 396. In sum, the court recognized that EPA might adopt for one Clean Air Act program regulations defining "the component terms of 'source' that are different in scope from" regulations employed in another program "due to differences in the purpose and structure of the two programs." *Id.* at 397-98.

Applying this analysis, the court declared the bubble concept "precisely suited" to the goals of the PSD program, *"preserv[ing]* air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement." *Id.* at 402 (emphasis added).[31] A point-specific definition of source, in the *Alabama Power* panel's view, would be "contrary to the expressed purposes of the PSD provisions of the Act." *Id.* at 401.[32] The panel regarded its decision as entirely in harmony with this court's decision less than two years earlier in *ASARCO, Inc. v. EPA,* for *"ASARCO* . . . dealt with a significantly different regulation and statutory purpose." *Id.* at 402; *cf. infra* note 37.

In *ASARCO* the court "rejected *in toto"* EPA's appli-

31. Accommodating this conclusion within its holding that Congress had constrained EPA's authority to identify the component terms of "source," the court observed that "installation . . . in its common usage" can mean an entire plant. 636 F.2d at 397.

32. The court acknowledged that Congress did not specify, in either the language or the legislative history of Part C, "which of [the] two constructions [the bubble concept or the individual unit approach] was to be controlling." *Id.* (footnote omitted).

cation of the bubble concept[33] to the NSPS program.[34] 578 F.2d at 325, 326-27. In addition to finding the bubble regulations inconsistent with the plain language of the Act,[35] the court found them contrary to the basic purpose of the NSPS program, to "*improve*[] air quality." *Id.* at 327 (emphasis in original). "The bubble concept in the challenged regulations would undercut [the NSPS program] by allowing operators to avoid installing the best pollution control technology on an altered facility as long as the emissions from the entire plant do not increase."[36] *Id.* at 327-28.[37]

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33. Specifically, EPA had adopted regulations which defined "stationary source" to mean "any building, structure, facility or installation which emits or may emit any air pollutant and *which contains any one or combination of the following:*

(1) Affected facilities.

(2) Existing facilities.

(3) Facilities of the type for which no standards have been promulgated in this part."

See 578 F.2d at 324 (quoting 40 C.F.R. § 602(d) (1976)) (emphasis in original).

34. The NSPS program is designed to force new "sources" of pollution to employ the best demonstrated systems of emission reduction. 42 U.S.C. § 7411 (Supp. IV 1980).

35. *Compare* 42 U.S.C. § 7411(a)(3) (Supp. IV 1980) *with* language quoted in note 33.

36. The court further stated:

> Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements. The "best" pollution control technology would never have to be installed, and existing plants would use up much of the available clean air, inhibiting construction of new plants (which would comply with the NSPSs).

Id. at 329-30 n.40.

37. *ASARCO* was written broadly; one might well read it to imply that the bubble concept is inappropriate to any portion of the Clean Air Act. *See, e.g., id.* at 327, 329 ("we find that *any* version of the bubble concept is incompatible with the language of the Act and contrary to its [air quality enhancing] purpose") (emphasis in

These decisions, particularly the *Alabama Power* panel's reconciliation of its holding with *ASARCO, see supra* note 37, establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to improve the quality of the ambient air.[38]

Applying the *Alabama Power-ASARCO* test to the nonattainment provisions of the Act, we must conclude that

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original). *Alabama Power* narrowed *ASARCO's* scope by indicating that, although the Act as a whole is designed to enhance (not simply maintain) air quality, in ruling upon the application *vel non* of the bubble concept, the court must look to the purpose of the Clean Air program at issue.

38. EPA has attempted to reconcile *Alabama Power* and *ASARCO* differently. The agency asserts that the NSPS program reviewed in *ASARCO* "focuses exclusively on what demonstrated technology can achieve" on an individual piece of equipment. EPA Brief at 26. On the other hand, the PSD program examined in *Alabama Power* "is principally geared to the effects of emissions from a new or modified source on air quality." *Id.* It is a plant's *net* emission increase, EPA contends, which affects air quality. *Id.* at 27. Describing Part D of the Act as geared to emissions rather than to technology, EPA readily concludes that the bubble concept is appropriately applied to the nonattainment program, just as it is to the PSD program, which is similarly oriented to the effect of emissions on air quality.

This attempted distinction is infirm. First, we note that the nonattainment scheme does contain technology-forcing provisions. *See* 42 U.S.C. § 7503(2) (Supp. IV 1980); *see also* H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (1977) ("the technology-forcing purpose . . . is best served by requiring maximum feasible pollution control from . . . new sources in dirty air areas"). Second, and of greater importance to our decision, the proffered distinction surely is not the one *Alabama Power* drew. That decision focuses cleanly on whether the program at issue is designed to improve or simply to maintain air quality. *See* 636 F.2d at 401-02.

the bubble concept may not be employed in that scheme.[39] The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs.[40] *See supra* note 6 and accompanying text. This purpose comfortably places Part D on the "improving" side of the line drawn by *Alabama Power* and *ASARCO* and thus

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39. Both Petitioners and Intervenors claim support for their opposing bubble concept positions in the 1977 Amendments' legislative history. *Compare* Brief for Petitioners at 42-44 *with* Brief for Industry Intervenor-Respondents at 37-39. We agree with EPA that "[w]ith regard to the actual content of the definition of 'source,' the legislative history is at best contradictory," EPA Brief at 17; therefore, the purposes of the nonattainment program should guide our decision here. *Id.* at 20. We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory direction would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will.

40. EPA strenuously argues that the purpose of the construction moratorium, *see supra* pp. 8-9, is solely to maintain the air's quality in nonattainment areas until the revised SIPs are in place. Therefore, EPA reasons, the bubble concept is eminently suitable for the moratorium program. *See* EPA Brief at 33-36. Petitioners dispute EPA's premise. They claim that the purposes of the moratorium are two-fold, both directed at improving air quality: (1) to pressure the states into rapidly adopting revised SIPs; and (2) to prevent construction or modification of sources with less stringent pollution control than the revised SIP might require once implemented. Brief for Petitioners at 14. In light of these asserted purposes, Petitioners conclude that the bubble concept is incompatible with the moratorium program.

We need not resolve this dispute for EPA has examined the moratorium with tunnel vision. Whatever role the moratorium is to play, it has been cast, not as a discrete program, but as an integral part of a larger production, the nonattainment scheme. Application of the bubble concept to the moratorium, thereby excluding a significant portion of industry's activities from its provisions, would not serve the NAAQS achievement purposes and goals of the nonattainment program.

rules out application of the bubble concept to the nonattainment program.[41]

EPA argues that we have misperceived the purpose and nature of the nonattainment program. The agency asserts that a fundamental purpose of the nonattainment scheme is to afford the states flexibility in designing revised SIPs which will attain compliance with the NAAQSs. *See* EPA Brief at 20-23 (quoting H.R. Rep. No. 294, *supra* note 38, at 211). The bubble concept, EPA argues, would further this statutory purpose by leaving the states with considerable authority to define source as they believe best-advised: they might adopt the bubble concept or, if necessary for timely attainment, a more stringent standard. Regardless of the method chosen, EPA maintains, the states remain under an obligation to submit and comply with a revised SIP that assures improved air quality. Fulfillment of the other prime purposes of the nonattainment program, timely compliance with the NAAQSs and reasonable further progress toward

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41. In promulgating the August 7, 1980, regulations, EPA clearly expressed its belief that the dual definition, by "bring[ing] in more sources or modifications for review than would the plant-wide definition" was "more consistent with Congressional intent" to reduce emissions, improve air quality, and require better pollution control technology in nonattainment areas. 1980 Regulations, 45 Fed. Reg. at 52697-98. In explaining its October 14, 1981, revisions, EPA suggested just the opposite: the dual definition may in fact retard improvement in air quality by discouraging replacement of older processes or equipment with newer, cleaner varieties. 1981 Regulations, 46 Fed. Reg. at 50768; *see also* Notice, 46 Fed. Reg. at 16281. However, in abandoning its earlier position, EPA did not cite, nor have we found in the record, any study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality *in the aggregate*. Therefore, EPA's decision to implement the bubble concept, if based on this rationale, would not rise to the level of reasoned decisionmaking for EPA "has some burden . . . to show that a regulation once considered to [effectuate policy] efficiently can no longer be expected to do so." State Farm Mut. Auto. Ins. Co. v. Department of Transportation, 680 F.2d 206, 231 (D.C. Cir. 1982). Speculation is not enough.

that goal, EPA asserts, is thereby assured. Thus, EPA concludes, application of the bubble concept to the nonattainment scheme fits neatly within the "purpose" language of *Alabama Power*. We disagree.

As we recently pointed out, *see Wilson v. Johns-Manville Sales Corp.*, ... F.2d ....., ... & n.36, No. 81-2019, slip op. at 15 & n.36 (D.C. Cir. July 30, 1982), the legal significance of a word or phrase must be gleaned from the context in which it is used. In the *Alabama Power-ASARCO* context, "purpose" clearly means goal, objective. The goal of the nonattainment program is undoubtedly to improve air quality in regions lagging behind in meeting the NAAQSs. Offering flexibility to the states may be a method of attaining that objective, but it is not an independent goal of the nonattainment scheme.

We further note that the permit and moratorium provisions of Part D are wholly federal requirements imposed on the states. 42 U.S.C. § 7503 (Supp. IV 1980). The states do not retain flexibility to submit SIPs which provides for timely attainment of the NAAQSs, but which does not contain a permit program applicable to new or modified sources.[42] Allowing the states large leeway to define the sources to which the federal requirement applies is not easily reconciled with the statutory design.

B. *The Reconstruction Rule*

EPA explained that it deleted the reconstruction rule from the nonattainment program regulations because, upon the agency's adoption of the plantwide definition of source, the rule would do scant service. *See* 1981 Regulations, 46 Fed. Reg. at 50767; EPA Brief at 40; *supra* p. 13. The bubble concept, pursuant to our decision today, may

42. *See* 123 Cong. Rec. 18017 (1977) (statement of Sen. Muskie).

not be employed in nonattainment program regulations. Therefore, EPA's incidental deletion of the reconstruction rule must be vacated together with the agency decision to which it is ancillary.[43]

---

43. Intervenors proffer several alternative reasons supporting EPA's deletion of the reconstruction rule. *See* Brief for Industry Intervenor-Respondents at 59-66. However, it is a "central tenet of administrative law that a reviewing court may not affirm an administrative agency's actions on a reasoned basis different from the rationale actually put forth by the agency." Public Media Center v. FCC, 587 F.2d 1322, 1332 (D.C. Cir. 1978); *see also* Gulf States Util. Co. v. FPC, 411 U.S. 747, 764 (1973); SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

Conclusion

This court's prior adjudications in *Alabama Power* and *ASARCO* preclude us from sanctioning EPA's employment of the bubble concept in the Clean Air Act's nonattainment program. We therefore grant the petition for review and vacate EPA's October 14, 1981, regulations.

So ordered.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
Citizens for a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.,
Intervenors

BEFORE: Mikva and Ginsburg, Circuit Judges and William J. Jameson*, Senior District Judge for the District of Montana

ORDER

On consideration of the petition for rehearing of intervenor-respondent Chevron U.S.A., Inc., filed September 30, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

---

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
Citizens for a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.
Intervenors

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Intervenor-respondent Chevron U.S.A., Inc., suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

Circuit Judges Wright, Tamm, Edwards and Bork did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
Citizens for a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.
Intervenors

BEFORE: Mikva and Ginsburg, Circuit Judges and William J. Jameson*, Senior District Judge for the District of Montana

ORDER

On consideration of the petitions for rehearing filed by respondent and intervenor-respondents, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Argued 5-21-82
Filed Oct 27, 1982

No. 81-2208

Natural Resources Defense Council, Inc.,
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Petitioners

v.

Anne M. Gorsuch, Administrator, U.S.
Environmental Protection Agency,
Respondent

American Petroleum Institute, et al.
Intervenors

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of respondent and intervenor-respondents (other than Chevron, U.S.A., Inc.) have been circulated to the full Court and a majority of the Court has not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

Circuit Judges Wright, Tamm, Edwards and Bork did not participate in the foregoing order.
Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc*.

Appendix C

Section 110 of the Clean Air Act, *as amended*, 42 U.S.C. § 7410, provides in relevant part:

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the

attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

• • •

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

Section 111 of the Clean Air Act, *as amended,* 42 U.S.C. § 7411, provides:

(a) For purposes of this section:

• • •

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

Section 171 of the Clean Air Act, *as amended,* 42 U.S.C. § 7501, provides:

For the purpose of this part and section 7410(a)(2)(1) of this title—

• • •

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

Section 172 of the Clean Air Act, *as amended*, 42 U.S.C. § 7502, provides:

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410 (a)(2)(1) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

• • •

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

Section 173 of the Clean Air Act, *as amended,* 42 U.S.C. § 7503, provides:

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if—

• • •

(4) the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part.

Appendix D

INTERVENOR-RESPONDENTS IN THE PROCEEDINGS BELOW (Other than Chevron U.S.A. Inc.)

Chemical Manufacturers Association
Rubber Manufacturers Association, Inc.
General Motors Corporation
American Iron and Steel Institute
Allegheny Ludlum Steel Corporation
Armco Inc.
Bethlehem Steel Corporation
Carpenter Technology Corporation
Inland Steel Company
Jones & Laughlin Steel Corporation
Republic Steel Corporation
United States Steel Corporation
American Petroleum Institute
Atlantic Richfield Company
Conoco Inc.
Exxon Corporation
Gulf Oil Corporation
Marathon Oil Company
Mobil Oil Corporation
Phillips Petroleum Company
Shell Oil Company
Standard Oil Company (Indiana)
Texaco Inc.
The Standard Oil Company (Ohio)
Union Oil Company of California
Alabama Power Company
Appalachian Power Company
Arizona Public Service Company

The Hartford Electric Light Company
Holyoke Water Power Company
Western Massachusetts Electric Company
Northern Indiana Public Service Company
Ohio Edison Company
Pennsylvania Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas and Electric Company
Pacific Gas and Electric Company
Pennsylvania Power & Light Company
The Potomac Edison Company
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
Public Service Electric and Gas Company
Rochester Gas and Electric Corporation
Salt River Project
San Diego Gas & Electric Company
Southern California Edison Company
Tampa Electric Company
Texas Utilities Generating Company
Toledo Edison Company
Tucson Electric Power Company
Union Electric Company
Virginia Electric and Power Company
West Penn Power Company
Wisconsin Electric Power Company
Wisconsin Power and Light Company
Wisconsin Public Service Corporation
the Edison Electric Institute
the National Rural Electric Cooperative Association

Baltimore Gas and Electric Company
Boston Edison Company
Carolina Power & Light Company
Central and South West Corporation
Central Power and Light Company
Public Service Company of Oklahoma
Southwestern Electric Power Company
West Texas Utilities Company
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Main Power Company
The Cincinnati Gas & Electric Company
Columbus and Southern Ohio Electric Company
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power & Light Company
The Detroit Edison Company
Duke Power Company
Florida Power Corporation
Florida Power & Light Company
Georgia Power Company
Gulf Power Company
Gulf States Utilities Company
Houston Lighting & Power Company
Illinois Power Company
Indiana & Michigan Electric Company
Indianapolis Power & Light Company
Iowa-Illinois Gas and Electric Company
Iowa Power and Light Company
Iowa Public Service Company
Kansas City Power & Light Company
Kentucky Power Company
Kentucky Utilities Company
Madison Gas and Electric Company
Arkansas Power & Light Company
Louisiana Power & Light Company
Mississippi Power & Light Company
New Orleans Public Service, Inc.
Mississippi Power Company
Monongahela Power Company
Nevada Power Company
New England Power Company
New York State Electric & Gas Corporation
Niagara Mohawk Power Corporation
Northeast Utilities Service Company
The Connecticut Light and Power Company

Office-Supreme Court, U.S.
FILED
AUG 30 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1005, 82-1247 and 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A INC., a Corporation,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners.

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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August, 1983

Petitions for Certiorari filed December 15, 1982, January 25, 1983, March 25, 1983—Certiorari granted May 31, 1983

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NOTICE

The following materials are not included in this Joint Appendix because they appear at the following pages of the Appendices to the Petition for a Writ of Certiorari in No. 82-1005:

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GENERAL DOCKET

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2208

NATURAL RESOURCES DEFENSE COUNCIL, INC.
CITIZENS FOR A BETTER ENVIRONMENT, INC.
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
Petitioners,

v.

ANNE M. GORSUCH, ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
AMERICAN IRON AND STEEL INSTITUTE,
RUBBER MANUFACTURERS ASSOCIATION, INC.,
GENERAL MOTORS CORPORATION,
ALABAMA POWER COMPANY, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors.

DATE	*FILINGS-PROCEEDINGS*
11-18-81	Petitioners' petition for review of an order of the EPA
11-25-81	Motion of Alabama Power Company, *et al.* for leave to intervene
12-01-81	Motion of Chemical Manufacturers Association for leave to intervene

12-09-81	Petitioners' motion for a stay and other relief pending review
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12-09-81	Motion of the American Petroleum Institute, *et al.*, for leave to intervene
12-16-81	Motion of Rubber Manufacturers Association, Inc., for leave to intervene
12-17-81	Motion of American Iron and Steel Institute for leave to intervene
12-18-81	Motion of General Motors Corporation for leave to intervene as a respondent
12-22-81	Clerk's order that the motion of American Petroleum Institute, *et al.*, for leave to intervene is granted
12-22-81	Clerk's order that the motions of the American Iron and Steel Institute and the Rubber Manufacturers Association, Inc., for leave to intervene is granted
12-22-81	Clerk's order that the motion of General Motors Corporation for leave to intervene is granted
12-22-81	Intervenor's (Chevron-included in the motion to intervene by American Petroleum Institute) memorandum in opposition to petitioner's motion for a stay and other relief pending review
12-23-81	Respondent's memorandum in opposition to petitioners' motion for a stay and for other relief pending review
12-28-81	Certified Index to Record
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08-17-82	Opinion for the Court filed by Circuit Judge Ginsburg
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10-27-82	Per Curiam order that the petition for rehearing of intervenor-respondent Chevron USA Inc. filed 9/30/82, is denied
10-27-82	Per Curiam order, en banc, that intervenor-respondent Chevron USA Inc. suggestion for rehearing en banc is denied
10-27-82	Per Curiam order that the petitions for rehearing filed by respondent and intervenor-respondents are denied
10-27-82	Per Curian order, en banc, that the suggestions for rehearing en banc of respondent and intervenor-respondents (other than Chevron USA Inc.) are denied
11-02-82	Intervenor's (Chevron USA Inc.) motion for stay of mandate
11-02-82	Respondent's motion to stay issuance of mandate
11-02-82	Intervenor's (American Iron and Steel Institute) motion for stay of mandate pending application for certiorari

11-09-82	Petitioners' corrected memorandum in opposition to further stay of the mandate
11-12-82	Intervenor's (Chevron USA Inc.) reply memorandum in support of stay of mandate
11-17-82	Intervenor's (American Iron and Steel Institute) reply to petitioners' opposition to motions to stay issuance of the mandate
11-17-82	Respondent's reply to petitioners' opposition to stay issuance of the mandate
11-17-82	Per Curiam order that the motions for stay of mandate are granted and the Clerk is directed not to issue the mandate herein for a period of thirty (30) days from the date of this order
12-23-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 12-15-82 in SC No. 82-1005
01-25-83	Copy of letter from Clerk, Supreme Court dated 1-21-83 extending time to file petition of writ of certiorari to 3-26-83 in SC No. A-628
01-31-83	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 1-25-83 in SC No. 82-1247
04-04-83	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 3-25-83 in SC No. 82-1591
06-03-83	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1005 on 5-31-83
06-03-83	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1247 on 5-31-83
06-03-83	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1591 on 5-31-83

A. Orders Of The United States Supreme Court Granting Certiorari:

1. Order of the United States Supreme Court Granting Certiorari, filed May 31, 1983 (No. 82-1005)

Supreme Court of the United States

No. 82-1005

CHEVRON U.S.A. INC.,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ORDER ALLOWING CERTIORARI. Filed May 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-1247, *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, Inc., et al.* and case No. 82-1591, *William D. Ruckelshaus, Administrator, Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., et al.*, and a total of one hour is alloted for oral argument.

2. Order of the United States Supreme Court Granting Certiorari, filed May 31, 1983 (No. 82-1247)

Supreme Court of the United States

No. 82-1247

AMERICAN IRON AND STEEL INSTITUTE, et al.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ORDER ALLOWING CERTIORARI. Filed May 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-1005, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.* and case No. 82-1591, *William D. Ruckelshaus, Administrator, Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., et al.*, and a total of one hour is allotted for oral argument.

3. Order of the United States Supreme Court Granting Certiorari, filed May 31, 1983 (No. 82-1591)

Supreme Court of the United States

No. 82-1591

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ORDER ALLOWING CERTIORARI. Filed May 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-1005, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.* and case No. 82-1247, *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, Inc., et al.*, and a total of one hour is allotted for oral argument.

B. Federal Register Publications:

1. Emission Offset Interpretative Rule, 41 Fed. Reg. 55524 (December 21, 1976)

Title 40—Protection of Environment

CHAPTER 1—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 51—REQUIREMENTS FOR PREPARATION, ADAPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Air Quality Standards; Interpretative Ruling

The Interpretative Ruling appearing below addresses the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources. The ruling provides in general that a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the standards. While the ruling is effective now, EPA is actively soliciting public comment on the ruling's basic policies and detailed provisions.

BACKGROUND

Section 110 of the Clean Air Act requires State Implementation Plans (SIP's) to insure that primary (health-related) national ambient air quality standards be attained as expeditiously as practicable, but not later than mid-1975 (except in those relatively few areas where an extension to mid-1977, at the latest, has been granted pursuant to § 110(e)). Sec-

ondary (welfare-related) ambient standards are to be met within a "reasonable time." Most SIP's have specified secondary standard attainment dates which are the same as the primary standard attainment dates.

Once the ambient standards have been attained, they must be maintained [section 110(a)(2)(B)]. By virtue of the Act's attainment and maintenance requirements and EPA's regulations appearing at 40 CFR 51.18, promulgated in August 1971, all SIP's must contain regulations requiring preconstruction review and disapproval of new or modified air pollution sources which would "interfere with" the attainment or maintenance of a national ambient air quality standard (NAAQS). Since the NAAQS attainment dates have already passed (or will soon pass) and the ambient standards have not been attained in many areas of the country, questions have arisen as to whether, and to what extent, new stationary sources may legally be permitted to construct in such areas. In response to these questions, EPA's interpretative ruling on the preconstruction review requirements of 40 CFR 51.18 is set forth below:

Public Participation and Review of Ruling

A draft of the ruling was sent to all State air pollution control agencies in April 1976, for review and comment. Their comments are available for public inspection at the EPA Public Information Reference Unit, 401 M Street, SW, Washington, D.C. 20460. In addition, EPA officials have discussed various drafts of the ruling in meetings with representatives of the State and Territorial Air Pollution Program Administrators, Association of Local Air Pollution Control Officials, National Governors Conference, National Conference of State Legislators, U.S. Conference of Mayors/National League of Cities, National Association of Counties, AFL-CIO, industrial groups, and environmental groups.

EPA recognizes that the ruling has profound national policy implications and that even more extensive public debate is needed on the issues of whether (and how) economic growth

may be accommodated where ambient air quality standards are being exceeded. EPA therefore is actively soliciting public comment on the ruling, in regard to both its basic policies and its detailed provisions. EPA may make adjustments to the ruling as warranted by the public comment. (Information regarding the nature and timing of the public comment is provided below.) EPA believes that these important national issues must ultimately be resolved by Congress through more explicit guidance in the Clean Air Act; hopefully, the publication of the ruling and the resulting public comments will provide a useful focus for legislative deliberations.

Implementation and Enforcement of Interpretative Ruling

In all but six SIP's, EPA has approved the State's own preconstruction review regulation adopted in conformance with 40 CFR 51.18. The ruling is therefore largely for the benefit of State and/or local reviewing authorities.[1] Only in the six states where EPA has been required to promulgate its own preconstruction review regulation in place of deficient State regulations will the provisions of the ruling be implemented directly by EPA (through its Regional Offices).

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[1] Since the SIP regulations were adopted to comply with 40 CFR 51.18 and this ruling articulates what 40 CFR 51.18 requires at a minimum, EPA feels that States should generally be able to implement the ruling's requirements without regulatory SIP amendments. Where a State desires to use the maximum flexibility provided in the ruling (States retain the right to impose stricter conditions), it will be up to the State to determine whether regulatory changes and/or a State "interpretative" ruling may be needed as a matter of State law. It should be noted that EPA is publishing advance notice of proposed amendments to 40 CFR 51.18 elsewhere in today's *Federal Register* (41 FR 55558) which, when finalized, will in all probability require amendments to SIP preconstruction review regulations. States may therefore wish to defer any regulatory amendments until the EPA rulemaking process is completed.

The ruling in no way requires a State or local reviewing authority to approve a source that meets the requirements set forth therein, since the authority to go beyond minimum Federal requirements is clearly protected by Section 116 of the Act. Available options, such as emission offsets, are allowable only at the discretion of local and State government. There are many reasons why a State or local authority might decide to prohibit a new source in addition to the criteria set forth in the ruling. Examples are the availability of alternative sites that are more environmentally acceptable, a decision that a proposed emission offset would not be in the best interest of the community, or a determination that allowing the new source would not in any case be in the best interest of the community.

Because interested parties in the public and private sector have (as noted above) been informally apprised of the basic provisions of the ruling and have had the opportunity to provide informal comments, and because the preconstruction review process is already being carried out under 40 CFR 51.18 (with continually-arising issues needing resolution), in EPA's judgment it is in the public interest to make the ruling immediately effective upon publication in the FEDERAL REGISTER. It would be highly impracticable merely to propose the ruling and defer its effectiveness, since both reviewing authorities and applicants for permits would be presented with even greater uncertainty in the interim period. As an articulation of the minimum requirements for preconstruction review of new sources pursuant to 40 CFR 51.18, the ruling's effect is to declare that any permits which are more lenient than allowed by the ruling fail to comply with the requirements of the Clean Air Act. Where a State issues (or has issued) a permit contrary to the Act's reqirements, EPA can take legal action to invalidate the permit and/or proceed against the affected source owner to prevent construction.

RESPONSES TO PRELIMINARY COMMENTS

In response to preliminary informal comments (discussed above), it would be helpful to briefly clarify or highlight

certain important points about the ruling. In some instances, new provisions have been added to earlier drafts in response to such comments.

1. *"Major" sources (Part II.B.).* The ruling provides that while all sources subject to SIP review requirements should be reviewed for emission limitation compliance, only "major" new sources must be subject to an ambient air quality analysis and the stringent requirements for lowest achievable emission rate, more than equivalent emission reductions, and assurance of reasonable progress toward NAAQS achievement. This is in recognition of the fact that reviewing authorities have limited resources and that smaller air pollution sources may individually have an insignificant impact on air quality. For the present, the ruling defines a "major" source as having an allowable emission rate of 100 or more tons per year (1000 for carbon monoxide).

In the notice set forth at 41 FR 55558 in today's FEDERAL REGISTER, however, EPA has tentatively proposed a definition of 50 or more tons per year (500 for carbon monoxide) to be incorporated into 40 CFR 51.18. It should thus be apparent that EPA has not finally determined that the 100-ton figure is the most appropriate, and States are strongly encouraged wherever resources permit to utilize a lower cut-off number. For the present, however, EPA will not legally require sources smaller than the 100-ton cut-off to undergo an air quality analysis.

2. *Lowest achievable emission rate (Part IV.A.1.).* The ruling provides that a major new source seeking to locate in an area violating an NAAQS must meet an emission limitation which reflects the "lowest achievable emission rate" for such type of source. At a minimum, the lowest rate achieved in practice would have to be specified unless the applicant can demonstrate that it cannot achieve such a rate. In no event could the rate exceed any applicable new source performance standard (NSPS) set under section 111 of the Act.

This stringent requirement reflects EPA's judgment that a new source should be allowed to emit pollutants into an area violating a NAAQS only if its contribution to the violation

is reduced to the greatest degree possible. While cost of achievement may be an important factor in determining an NSPS applicable to all areas of the country (clean as well as dirty) as a minimum, the cost factor must be accorded far less weight in determining an appropriate emission limitation for a source locating in an area violating statutorily-mandated health and welfare standards.

3. *Emission offset "Baseline" where EPA has called for a SIP revision or study (Part IV.C.4.).* The principle behind the emission offset concept is that new sources should be allowed offset credit only for emission reductions from existing sources which would not otherwise be accomplished as a result of the Clean Air Act. Therefore, where EPA has found that a SIP is substantially inadequate to attain a NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or has called for a study to determine the need for such a revision), the existing SIP emission limitations could not be used as the "baseline" for determining offset credits (as would normally be the case). Emission limitations representing reasonably available control measures, which most revised SIP's should soon require, should be used instead.

4. *No construction after January 1, 1979 without SIP revision (Part IV.A.5.).* The ruling provides that in those areas (discussed in paragraph 3 immediately above) where EPA has called for a SIP revision or study, no permit issued on or after January 1, 1979, may allow the source to commence construction until EPA has approved or promulgated a SIP revision. This condition merely recognizes the fact that the new source review requirements of 40 CFR 51.18 are carried out as an integral part of a SIP, the purpose of which is to attain the health-related NAAQS as expeditiously as practicable. Where a SIP is so inadequate that EPA has identified the need to have it revised, it is EPA's judgment that new major source growth must be deferred if the SIP revision is not accomplished in a timely manner.

The January, 1979, date is relevant since in most SIP revisions which EPA requested in July, 1976, States were

given until July 1, 1978, to submit all necessary SIP revision measures. Under the framework of the Clean Air Act, EPA would then have six months either to approve the State's revision or promulgate its own revision. In some areas, EPA may have called for a study of the need for a SIP revision but has not requested a revision on a specified schedule. If EPA calls for such a revision with a submission deadline of later than July 1, 1978, the ruling provides that the January 1, 1979, date would be correspondingly extended.

It can thus be seen that this condition provides a useful link between the 40 CFR 51.18 preconstruction review procedures and the SIP revision process. Where States are delayed in their efforts to revise their SIP's, the effect will be to delay the construction of any new major polluting sources in the affected areas.

5. *More than "One-for-One" emission offsets (Part IV.A.3.).* It should be stressed that this ruling is not a "status quo" or "one-for-one" emission offset rule for areas violating the Act's health and welfare standards. The ruling makes clear that the emission offset reductions must exceed the new source's emissions so as to represent reasonable progress toward attainment of the NAAQS.

6. *No "Banking" of emission offset credit (Part IV.C.6.).* The ruling allows no leftover emission offset credit to be "banked" for future pollution growth once an emission offset has been executed for a particular new source. To allow such "banking" would be inconsistent with a basic policy of the Act and the ruling—namely, that at a minimum, no new source should be allowed to make existing NAAQS violations any worse.

7. *"External" emission offsets (Part V).* Several commenting States were concerned over possible administrative and legal problems associated with "external" emission offsets (provided by sources not owned by the new source owner). There were questions as to whether (1) States could legally tighten emission limits for existing sources in order to permit the construction of a new, possibly competing, source; (2) a source could reasonably persuade a competing source to

further control its emission in order to permit the new source to be built; and (3) States would be required to develop a new regulation for each emission offset situation.

In response to these concerns, it should be noted that a State is not required to investigate emission offset possibilities as a result of each request to construct a new source. States may leave such arrangements to the proposed new source. It should be noted that in many cases the additional emission reduction can be obtained by improvements in a facility already owned by the developer of the new source. This would be particularly true in cases where the new emissions would come from expansion of an existing source. Where such intracompany emission offsets are not possible, the new source may be required to look elsewhere.

The State need not revise its regulations for each emission offset situation, but may use any available mechanism to obtain the necessary legally binding commitment (enforceable by EPA and private parties under the Clean Air Act) from the source providing the emission offsets. Finally, it should be noted that the ruling generally reflects the maximum flexibility permitted under the Clean Air Act, and the allowance for external emission offsets is an example of the flexibility that EPA has sought to provide. Although some States may find the provision for external emission offsets unworkable for various reasons, such flexibilty should be available to those States that wish to use it.

8. *Sources in "Clean" areas which could impact on areas exceeding a NAAQS.* Several States requested specific quantification as to the incremental level of pollution that would be considered an exacerbation of an existing violation of a national standard. This question is only applicable when a major source is to be located in a "clean" area, but might impact an area that exceeds a NAAQS some distance away (i.e., a major source locating in the middle of an area that exceeds standards clearly will exacerbate the existing violations).

Over the next several months, EPA intends to develop regulatory guidance for standardizing the modeling proce-

dures to be used in evaluating control strategies and in conducting new source reviews (with respect to both the NAAQS and regulations for preventing significant deterioration of air quality (see 40 CFR 52.21)). As part of this guidance, the issue of the "significance" of a source's air quality impact will be addressed. Until such guidance is available, reviewing agencies must make a reasonable cutoff on the geographic extent of the air quality calculations, based on a case-by-case analysis of such factors as the size of the source, the validity of the air quality predictions at long distances, and other relevant factors.

9. *"Fugitive Dust" problems.* Several States have expressed concern over the potential disapprovals of particulate matter sources planning to locate in rural areas that violate a particulate NAAQS due primarily to natural fugutive dust. The Agency has set forth a tentative proposal on this issue in the advance notice of proposed rulemaking appearing in today's FEDERAL REGISTER at 41 FR 55558. The intent at this time is to focus on urban areas and other areas that exceed the national standards for particulate matter as a result of man's activities. For the present, a State should consult the appropriate EPA Regional Office for guidance if the State is considering whether and to what extent the terms of the ruling should apply to particulate sources seeking to locate in rural areas. Where emission offsets are necessary, the Administrator finds no reason for not allowing credit from controlling existing fugitive emission sources, as long as all other requirements set forth in the ruling are met.

It should be noted that especially for particulate matter, the geographical representativeness of a given monitor is often somewhat limited; that is, just because a monitor records high concentrations, it is not necessary to assume that such concentrations occur over a wide geographical area. Where a monitor is not located close to the proposed new source, it may be more appropriate (provided accurate emission inventories are available) to estimate existing air quality using a model than to use data from a remote monitoring location.

10. *Geographic applicability of ruling for hydrocarbon*

sources. Because wide-spread violations of the NAAQS for photochemical oxidants have been found even in remote rural areas, some commentors have assumed that hydrocarbon control programs (including emission offset requirements) are necessary in all areas where there are violations of the photochemical oxidant standard. Based on the data available at this time, EPA believes that the rural oxidant problem is largely due to transport of oxidant or its precursors from major urban areas. Consequently a distinction can reasonably be made for control purposes between the extensive areas where an oxidant problem exists and the areas where much of the problem is created. As described in more detail in the notice appearing in today's FEDERAL REGISTER at 41 FR 55558, investigations are underway to determine the areas where hydrocarbon control programs will be most effective in reducing the highest oxidant concentrations. It is expected that the resulting guidance will focus on major metropolitan areas (larger than 200,000 population) extending as much as 85 miles from the largest urban centers. For the present, all of the provisions of the ruling must be applied to hydrocarbon sources seeking to locate within such areas that violate the oxidant NAAQS. The appropriate EPA Regional Office should be consulted if additional guidance is needed.

11. *No accommodation of new sources merely because primary NAAQS will eventually be achieved.* Some commenting States have argued that the Clean Air Act does not authorize EPA to adopt the stringent conditions of this ruling. The argument appears to be that even if a State has not achieved a primary NAAQS by the Congressionally-mandated deadline, the State may permit major new pollution sources to worsen present air quality so long as NAAQS achievement is projected for some time in the future.

EPA finds this argument totally untenable in light of the words of the Act, its legislative history, and Court decisions. The Act demands that each primary (health-related) NAAQS be achieved "as expeditiously as practicable" but in no event (if all extensions are allowed) later than mid-1977.

The Courts have continually emphasized that the Act

demands primary NAAQS achievement by a date certain. EPA simply cannot interpret the Act to allow a major new source to make an existing primary NAAQS violation worse after the Congressional date certain has passed, and therefore even further delay the overdue NAAQS achievement. The only plausible interpretation of the Act other than that reflected in the ruling is that no new sources should be allowed in a violating area.

In should be noted that the Act is more flexible with regard to the secondary (welfare-related) NAAQS's. This point is dealt with in Part VI of the ruling.

12. *No accommodation of new sources based on cost-balancing approach.* Some have argued that a new source should be allowed to worsen existing NAAQS violations if a "cost-benefit" analysis indicates that the economic costs of necessary emission controls or offsets are excessive in relation to the resulting air quality benefits. For much the same reason discussed in section 11 immediately above, the Clean Air Act simply does not allow such an approach. Application of such a policy could allow further delay in achieving already-overdue standards.

Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health.

While EPA cannot allow cost considerations to override public health concerns, EPA is sensitive to the cost impacts of the Clean Air Act. EPA plans to assess the economic impact of the ruling as it is implemented to determine whether adjustments can be made consistent with the law, and/or whether legislative amendments would be prudent.

Again, the Act is more flexible with regard to the secondary NAAQS's. A cost-benefit analysis may convince a state of the need to defer its SIP attainment date for the secondary NAAQS's. (See part VI of the ruling.)

Relationship to Other Preconstruction Reviews and SIP Requirements

Preconstruction review is also being implemented under EPA's regulations for preventing significant deterioration of air quality (40 CFR 52.21) and the national emission standards for hazardous air pollutants (40 CFR Part 61). In addition, voluntary reviews are being conducted for new sources subject to EPA's new source performance standards (40 CFR Part 60). In cases where States have been delegated the responsibility to implement these various programs, the reviews are being implemented at the State level. Where States have not accepted delegation, EPA retains the new source review responsibility. Certain types of sources may be subject to more than one of these regulations, and where the program responsibility rests with a single agency, the preconstruction reviews are normally carried out simultaneously. Even though a source may undergo simultaneous review under several of the above mentioned regulations, the provisions of this ruling are applicable only to the review required under 40 CFR 51.18. Thus a source may meet the requirements of the ruling, yet be disapproved because it does not meet the requirements of one of the other applicable regulations.

The ruling is not intended to replace the requirement for a SIP control strategy to attain and maintain standards. An individual emission offset must always result in reasonable progress toward attainment, but does not need to demonstrate that the NAAQS will be attained.

Since SIP control strategies must account for anticipated source growth, some questions may arise as to how new sources that are allowed to construct under the ruling should be dealt with in the revised SIP control strategies that EPA has recently requested. The projection and allocation of new sources and emissions should be carried out in the normal manner (see EPA's Air Quality Maintenance Guidelines, Vols. 7 and 13), although additional information on the size distribution of the new sources may be necessary. Where it is clear that a certain portion of the new sources and emissions will be subject to the terms of the ruling, the SIP control strategy

does not need to account for such emissions (since the emission offset requirements will ensure that such sources will not increase emissions in the area).

PUBLIC COMMENTS

EPA strongly encourages all interested parties and the general public to comment on both the general policies and the detailed provisions of the ruling appearing below. EPA may make adjustments to the ruling as warranted by the public comment. Written comments should be submitted (preferably in triplicate) no later than February 15, 1977, to: Environmental Protection Agency, Control Programs Development Division (MD-15), Research Triangle Park, N.C. 27711.

EPA plans to conduct informal public hearings on this ruling in several cities throughout the country in the next few weeks. Notice of the time, place, and format of such hearings will appear shortly in the FEDERAL REGISTER.

Finally, it is important to note that a notice appears in today's FEDERAL REGISTER at 41 FR 55558 which sets forth EPA's advance notice of certain proposed changes to 40 CFR 51.18. The issues discussed there bear upon some of the issues addressed in this ruling, and persons commenting on both notices are urged to prepare a single set of comments.

Dated: December 15, 1976.

RUSSELL E. TRAIN,
Administrator

INTERPRETATIVE RULING FOR IMPLEMENTATION OF THE REQUIREMENTS OF 40 CFR 51.18

I. INTRODUCTION

This notice sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution under 40 CFR 51.18. This ruling reflects EPA's judgment that the Clean Air Act allows a major new or modified source[1] to locate in an area that exceeds a national

[1] Hereafter the term "new source" will be used to denote both new and modified sources.

ambient air quality standard (NAAQS) only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that these will be progress toward achievement of the NAAQS.

II. INITIAL ANALYSIS AND APPLICABLE REQUIREMENTS

A. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed new source subject to the SIP preconstruction review requirements approved or promulgated pursuant to 40 CFR 51.18 to determine if such a source will meet all applicable emission requirements in the SIP. If the reviewing authority determines that the proposed new source cannot meet the applicable emission requirements, the permit to construct must be denied.

B. Review of major sources for air quality impact. In addition, for each proposed "major" new source or "major" modification, the reviewing authority must perform an air quality analysis[2] to determine if the source will cause or exacerbate a violation of a NAAQS. A proposed source which would not be a "major" source may be approved without further analysis, provided such a source meets the requirement of Part II.A.

The term "major source" shall, as a minimum, cover any structure, building, facility, installation or operation (or combinatiaon thereof) for which the allowable emission rate is equal to or greater than the following:

	tons per year
Particulate matter	100
Sulfur oxides	100
Nitrogen oxides	100
Non-methane hydrocarbons (organics)	100
Carbon monoxide	1,000

[2] Required only for those pollutants causing the proposed source to be defined as a "major" source, although the reviewing authority may address other pollutants if deemed appropriate.

Similarly a "major modification" shall include a modification to any structure, building, facility, installation or operation (or combination thereof) which increases the allowable emission rate by the amounts set forth above. A proposed new source with an allowable emission rate exceeding the above amounts is considered a major source under this ruling, even though such a source may replace an existing source with the result that the net additional emissions are increased by less than the above amounts.

Where a source is constructed or modified in increments which individually do not meet the above criteria, and which are not a part of a program of construction or modification in planned incremental phases previously approved by the reviewing authority, all such increments commenced after the date this ruling appears in the FEDERAL REGISTER or after the lastest approval issued by the reviewing authority, whichever is most recent, shall be added together for determining applicability under this ruling. Moreover, where there is a group of proposed sources which individually do not meet the above criteria, but which would be constructed in substitution for a major source, the group should be collectively reviewed as a major source.

Allowable annual emissions shall be based on the applicable New Source Performance Standard (NSPS) set forth in 40 CFR Part 60 or the applicable SIP emission limitation, whichever is less, and the maximum annual rated capacity of the source. If the source is not subject to either a NSPS or SIP emission limitation, annual emissions shall be based on (1) the maximum annual rated capacity, and (2) the emission rate agreed to by the source as a permit condition.

The following shall not, by themselves, be considered modifications under this ruling:

(1) Maintenance, repair, and replacement which the reviewing authority determines to be routine for a source category;

(2) An increase in the hours of operation unless limited by previous permit conditions;

(3) Use of an alternative fuel or raw material (unless limited

by previous permit conditions), if prior to the publication of this ruling in the FEDERAL REGISTER, the source is designed to accommodate such alternative use; or

(4) Change in ownership of a source.

C. Air quality impact analysis. For "stable" air pollutants (i.e., SO_2, particulate matter and CO), the determination of whether a source will cause or exacerbate a violation of a NAAQS generally should be made on a case-by-case basis as of the proposed new source's operation date using the best information and analytical techniques available (i.e., atmospheric simulation modeling, unless a source will clearly impact on a receptor which exceeds a NAAQS). This determination should be independent of any general determination of nonattainment or judgment that the SIP is substantially inadequate to attain or maintain the NAAQS. This is because the area affected by a determination of SIP inadequacy usually conforms to established administrative boundaries such as Air Quality Control Regions (AQCR's) rather than a precisely-defined area where air quality problems exist. For example, a SIP revision may be required for an AQCR on the basis of a localized violation of standards in a small portion of the AQCR. If a source seeks to locate in the "clean" portion of the AQCR and would not affect the area presently exceeding standards or cause a new violation of the NAAQS, such a source may be approved. For major sources of nitrogen opides, the initial determination of whether a source would cause or exacerbate a violation of the NAAQS for NO_2 should be made using an atmospheric simulation model assuming all the nitrogen oxide emitted is oxidized to NO_2 by the time the plume reaches ground level. The initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate. For major sources of hydrocarbons, see the discussion entitled "Geographic Applicability of Emission Offset Requirements for Hydrocarbon Sources" in the Notice appearing in today's FEDERAL REGISTER at 41 FR 55558.

III. SOURCES LOCATING IN "CLEAN" AREAS, BUT WOULD CAUSE A NEW VIOLATION OF A NAAQS

If the reviewing authority finds that the allowable emissions[3] from a proposed major source would cause a new violation of a NAAQS, but would not exacerbate an existing violation, approval may be granted only if both of the following conditions are met:

Condition 1. The new source is required to meet a more stringent emission limitation[4] and/or the control of existing sources below allowable levels is required so that the source will not cause a violation of any NAAQS.

Condition 2. The new emission limitations for the new source as well as any existing sources affected must be enforceable in accordance with the mechanisms set forth in Part V below.

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[3] Where a new source will result in specific and well defined indirect or secondary emissions which can be accurately quantified, the reviewing authority should consider such secondary emissions in determining whether the source would cause or exacerbate a violation of the NAAQS. However, since EPA's authority to perform indirect source review relating to parking-type facilities has been restricted by statute, consideration of parking-type indirect impacts is not required.

[4] If the reviewing authority determimes that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see Part V). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under Section 304. Hereafter, the term "emission limitations" shall also include such design, operational, or equipment standards.

IV. SOURCES THAT WOULD EXACERBATE AN EXISTING VIOLATION OF A NAAQS

A. *Conditions for approval.* If the reviewing authority finds that the allowable emissions[3] from a proposed source would exacerbate an "existing" violation (i.e., as of the source's proposed start-up date) of a NAAQS, approval may be granted only if all the following conditions are met:

Condition 1. The new source is required to meet an emission limitation which specifies the lowest achievable emission rate for such type of source.[3] In determining the applicable emission limitation, the reviewing authority must consider the most stringent emission limitation in any SIP and the lowest emission rate which is achieved in practice for such type of source. At a minimum, the lowest emission rate achieved in practice must be specified unless the applicant can sustain the burden of demonstrating that it cannot achieve such a rate. In no event could the specified rate exceed any applicable NSPS. Even where the applicant demonstrates that it cannot achieve the lowest emission rate achieved in practice, this in itself would not operate to raise the required emission limitation to the applicable NSPS. The "lowest achievable emission rate" requirement must still apply, and the applicant would retain the burden of demonstrating that it cannot achieve any rate more stringent than the NSPS rate.

Condition 2. The applicant must certify that all existing sources owned or controlled by the owner or operator of the proposed source in the same AQCR as the proposed source are in compliance with all applicable SIP requirements or are in compliance with an approved schedule and timetable for compliance under a SIP or an enforcement order issued under Section 113. The reviewing authority must examine all enforcement orders for sources owned or operated by the applicant in the AQCR to determine if more expeditious compliance is practicable. Where practicable, a more expeditious compliance schedule for such sources must be required as an enforceable condition of the new source permit.

Condition 3. Emission reductions ("offsets") from existing

sources in the area of the proposed source (whether or not under the same ownership) are required such that the total emissions from the existing and proposed sources are sufficiently less than the total allowable emissions from the existing sources under the SIP[5] prior to the request to construct or modify so as to represent reasonable progress toward attainment of the applicable NAAQS.[2] Only intrapollutant emission offsets will be acceptable (e.g., hydrocarbon increases may not be offset against SO_2 reductions).

Condition 4. The emission offsets will provide a positive net air quality benefit in the affected area (see Part IV.D. below).[2]

Condition 5. For a source which would be located in an area where EPA has found that a SIP is substantially inadequate to attain a NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or an area where EPA has called for a study to determine the need for such a revision), permits granted on or after January 1, 1979[6] must specify that the source may not commence construction until EPA has approved or promulgated a SIP revision for the area (if the source is a major source of the pollutant subject to the call for revision or study).

B. *Exemptions from certain conditions.* The reviewing authority may exempt a source from Condition 1 under Part III or Conditions 3 and 4 under Part IV.A., in cases where the source must switch fuels due to lack of adequate fuel supplies or where the source is required as a result of EPA regulations (i.e., lead-in-fuel requirements) to install additional process equipment and no exception from such an EPA regulation is available to the source. Such an exemption may be granted only if: (i) the applicant demonstates that it made its best efforts to obtain sufficient emission offsets to comply with Condition 1 under Part III or Conditions 3 and 4 under Part IV.A and that such efforts were unsuccessful; (ii) the

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[5] Subject to the provisions of Part IV.C. below.

[6] Or, if later, the date which is six months after the deadline for submittal of the revision.

applicant has secured all available emission offsets; and (iii) the applicant will continue to seek the necessary emission offsets and apply them when they become available. Such an exemption may result in the need to revise the SIP to provide additional control of existing sources.

C. *Baseline for determining credit for emission offsets.* Except as provided below, the baseline for determining credit for emission and air quality offsets will be the SIP emission limitations in effect at the time the application to construct or modify a source is filed. Thus, credit for emission offset purposes may be allowable for existing control that goes beyond that required by the SIP.

1. *No applicable SIP requirement.* Where the applicable SIP does not contain an emission limitation for a source or source category, the emission offset baseline involving such sources shall be the actual emissions at the time the permit request is filed (determined by source test or other appropriate means).

2. *Combustion of fuels.* Generally, the emissions for determining emission offset credit involving an existing fuel combustion source will be the allowable emissions under the SIP for the type of fuel being burned at the time the new source application is filed (i.e., if the existing source has switched to a different type of fuel at some earlier date, any resulting emission reduction [either actual or allowable] shall not be used for emission offset credit). If the existing source commits to switch to a cleaner fuel at some future date, emission offset credit, based on the allowable emissions for the fuels involved, is acceptable; provided, that the permit must be conditioned to require the use of a specified alternative control measure which would achieve the same degree of emission reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emission offset credit for fuel switches.

Where the particulate emission limit for fuel combustion exceeds the appropriate uncontrolled emission factor in "Compilation of Air Pollutant Emission Factors" (AP-42) (as when

a State has a single emission limit for all fuels), emission offset credit will only be allowed for control below the appropriate uncontrolled emission factor in AP-42. (Actual emissions determined by a source test may be used in place of the uncontrolled emission factor in AP-42 in the above situation.)

3. *Operating hours and source shutdown.* Emission offsets generally should be made on a pounds-per-hour basis when all facilities involved in the emission offset calculations are operating at their maximum expected production rate. The reviewing agency should specify other averaging periods (e.g., tons per year) in addition to the pounds-per-hour basis if necessary to carry out the intent of this ruling. A source may be credited with emission reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below that which existed at the time the new source application was submitted; provided, that the work force to be affected has been notified of the proposed shutdown or curtailment. Emission offsets that involve reducing operating hours or production or source shutdowns must be legally enforceable, as is the case for all emission offset situations.[7] Nothing contained in this ruling is intended to alter EPA's interpretation of the Clean Air Act with regard to the use of "supplemental control systems" or "stack height increases" as set forth at 41 FR 7450 (February 18, 1976).

4. *EPA has requested a SIP revision (or study).* Where EPA has found that a SIP is substantially inadequate to attain a NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or EPA has called for a

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[7] Source shutdowns and curtailments in production or operating hours occurring prior to the date the new source application is filed generally may not be used for emission offset credit. However, where an applicant can establish that it shut down or curtailed production after SIP approval as a result of enforcement action providing for a new source as a replacement for the shut down or curtailment, credit for such shut down or curtailment may be applied to offset emissions from the new source.

study to determine the need for such a revision) the baseline for emission offset credit involving sources of the relevant pollutant will be the emissions resulting from the application of reasonably available control measures. The intent of this requirement is to prevent sources from receiving emission offset credit against an inadequate SIP and nullifying the gains that will be achieved through the required SIP revision. In effect, States should use the anticipated SIP revision as the baseline for emission offset credit until such time as the SIP is formally revised.

5. *Credit for hydrocarbon substitution.* EPA has found that almost all non-methane hydrocarbons are photochemically reactive and that low reactivity hydrocarbons eventually form as much photochemical oxidant as the highly-reactive hydrocarbons. Therefore, no emission offset credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity.

6. *No "banking" of emission offset credit.* Once an emission offset has been executed for a particular new source, there can be no leftover credit to "bank" for additional new source growth in the future. This "no banking" rule would not prohibit, however, the issuance of a single permit to cover more than one phase of a phased-construction project.[8] Similarly, for State-initiated emission offsets (see Part V.B.), several different sources may be allowed to construct as part of a general SIP revision, so long as the plans for each source are definite and such sources are specifically identified as the recipients of the emission offset credits in the SIP revision.

D. *Geographic area of concern.* In the case of emission offsets involving hydrocarbons or NO_x, the offsets may be obtained from sources located anywhere in the broad vicinity of the proposed new source (within the area of non-attainment, and usually within the same air quality control region). This is because areawide oxidant and NO_2 levels are generally not as dependent on specific hydrocarbon or NO_x source location

[8] If any phase covered by the permit is for any reason not constructed, there would be no resulting credit to "bank."

as they are on overall area emissions. However, since the air quality impact of SO_2 particulate and carbon monoxide sources is site dependent, simple areawide mass emission offsets are not appropriate. For these pollutants, the reviewing authority should require atmospheric simulation modeling to ensure that the emission offsets provide a positive net air quality benefit. However, to avoid unnecessary consumption of limited, costly and time consuming modeling resources, in most cases it can be assumed that if the emission offsets are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height, the air quality test under Condition 4 in Part IV.A above will be met. Thus, when stack emissions are offset against a ground level source at the same site, modeling would be required.

E. *Reasonable progress towards attainment.* As long as the emission offset is greater than one-for-one, and the other criteria set forth above are met, EPA does not intend to question a reviewing authority's judgment as to what constitutes reasonable progress towards attainment as required under Condition 3 in Part IV.A above. Reviewing authorities should bear in mind, however, that the control achieved through emission offsets can significantly assist the authorities in developing legally acceptable SIP's.

V. ADMINISTRATIVE PROCEDURES

The necessary emission offsets may be proposed either by the owner of the proposed source or by the local community or the State. The emission reduction committed to must be enforceable by authorized State and or local agencies and under the Clean Air Act, and must be accomplished by the new source's start-up date.

A. *Source initiated emission offsets.* A source may propose emission offsets which involve (1) reductions from sources controlled by the source owner (internal emission offsets); and/or (2) reductions from neighboring sources (external emission offsets). The source does not have to investigate all

possible emission offsets. As long as the emission offsets obtained represent reasonable progress toward attainment, they will be acceptable. It is the reviewing authority's responsibility to assure that the emission offsets will be as effective as proposed by the source. An internal emission offset will be considered enforceable if it is made a SIP requirement by inclusion as a condition of the new source permit and the permit is forwarded to the appropriate EPA Regional Office.[9] An external emission offset will not be accepted unless the affected source(s) is subject to a new SIP requirement to ensure that its emissions will be reduced by a specified amount in a specified time. Thus, if the source(s) does not obtain the necessary reduction, it will be in violation of a SIP requirement and subject to enforcement action by EPA, the State and/or private parties. The form of the SIP revision may be a State or local regulation, operating permit condition, consent or enforcement order, or any other legally enforceable mechanism available to the State. If a SIP revision is required, the public hearing on the revision may be substituted for the normal public comment procedure required for all major sources under 40 CFR 51.18. The formal publication of the SIP revision approval in the FEDERAL REGISTER need not appear before the source may proceed with construction. To minimize uncertainty that may be caused by these procedures, EPA will, if requested by the State, propose a SIP revision for public comment in the FEDERAL REGISTER concurrently with the State public hearing process. Of course, any major change in the final permit/SIP revision submitted by the State may require a reproposal by EPA.

B. *State or community initiated emission offsets.* A State or community which desires that a source locate in its area

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[9] The emission offset will therefore be enforceable by EPA under Section 113 as an applicable SIP requirement and will be enforceable by private parties under Section 304 as an emission limitations. EPA will publish notice of such emission offsets in the FEDERAL REGISTER.

may commit to reducing emissions from existing sources to sufficiently outweigh the impact of the new source and thus open the way for the new source. As with source-initiated emission offsets, the commitment must be something more than one-for-one. This commitment must be submitted as a SIP revision by the State.

The provisions of Part IV.C.4 above remain applicable to State or community initiated emission offsets. Therefore, where EPA has found that a SIP is substantially inadequate to attain an NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or has called for a study to determine the need for such a revision), the resulting emission reduction may not be used as an emission offset.

VI. POLICY WITH RESPECT TO SECONDARY STANDARDS

The statutory attainment dates for the primary NAAQS have now passed or will pass very soon and cannot be administratively extended. Therefore, this ruling does not allow a new source to cause or exacerbate a primary NAAQS violation on the grounds that the SIP will eventually achieve the NAAQS (as may have been permitted in some cases before the statutory attainment dates).

The Act provides more flexibility with respect to secondary NAAQS's. Rather than setting specific deadlines, Section 110 requires secondary NAAQS's to be achieved within a "reasonable time." Under 40 CFR 51.13(b), a State may revise its SIP to provide extensions from its present secondary NAAQS deadlines. If, therefore, a State submits (and EPA approves) such a revision, a new source which would cause or exacerbate a secondary NAAQS violaion may be exempt from the Conditions of Part IV.A. so long as the new source meets the applicable SIP emission limitations and will not interfere with attainment by the newly-specified date.

[FR Doc. 76-37346 Filed 12-20-76; 8:45 a.m.]

2. Amended Emission Offset Interpretative Rule (excerpted), 44 Fed. Reg. 3274 (January 16, 1979)

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION AND SUBMITTAL OF IMPLEMENTATION PLANS

Emission Offset Interpretative Ruling

Agency: Environmental Protection Agency.
Action: Final Rule.
Summary: This rule describes the requirements for preconstruction review which apply to large new (or modified) air pollution sources affecting areas with air quality worse than the levels set to protect the public health and welfare. The action makes certain revisions to ERA's Emission Offset Interpretative Ruling of December 21, 1976 (41 FR 55524). These revisions are a result of the public comments (including four public hearings) on the December 21, 1976, Interpretative Ruling and changes required by the Clean Air Act Amendments of 1977 (Pub. L. 95–95, note under 42 U.S.C. 7401).
DATES: These changes are applicable to permits applied for on or after January 16, 1979. States may, if they so desire, make these changes applicable on a retroactive basis unless specified otherwise in the Ruling. Comments on specified issues should be submitted in accordance with the proposal published elsewhere in today's FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT:

D. Kent Berry, Office of Air Quality Planning and Standards, Environmental Protection Agency. Mail Drop 11, Research Triangle Park. North Carolina 27711, Telephone: 919-541-5341.

SUPPLEMENTARY INFORMATION: On December 21, 1976, EPA issued an Interpretative Ruling (41 FR 55524) addressing the issue of whether and to what extent national ambient air quality standards (NAAQS) established under the Clean Air Act may restrict or prohibit construction of major new or modified stationary air pollution sources. The Ruling provides, in general, that a major new source, which emits pollutants in excess of specified amounts and would otherwise contribute to an existing violation of a national standard, may be constructed only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the standards. Where such a source would otherwise cause a new violation of an NAAQS, offsets or additional control must be provided to prevent a new violation of the standards.

Although this Ruling was made immediately effective, the Agency solicited written comments and held public hearings in San Francisco, Dallas, Chicago, and New York. The comments received (including a summary of those comments) and the public hearing records are available for public inspection and copying during normal business hours at: Public Information Reference Unit, Environmental Potection Agency, Room 2922 (EPA Library) 401 M Street, SW., Washington, D.C. 20460.

Permits Required for New or Modified Air Pollution Sources

The Federal Clean Air Act and most State regulations require that new air pollution sources and modifications of existing sources which would increase air pollution emissions must obtain a permit *before construction is begun*. The State (or local) new source review procedures apply to almost all new or modified air pollution sources. This review is intended to ensure that new sources will meet all applicable air pollution regulations adopted by the States. In addition, larger sources

(which will have increased emissions of 50 tons per year of any air pollutant)[1] will be subject to more stringent requirements relating to the source's impact upon air quality.

A given source may have air pollution impacts in an area which has clean air or in an area which has dirty air. Some sources can affect both types of areas. The type of review requirements that a new source must comply with depends on whether the source affects a dirty air or clean air area. A source which impacts an area where the air is cleaner than the national ambient air quality standards (NAAQS) is subject to regulations for preventing significant deterioration (PSD) of air quality.[2] The purpose of these regulations is to keep clean air clean and the primary focus is to limit new emissions of sulfur oxides and particulate matter.

A new source that would affect a dirty air area will also be subject to EPA's Emission Offset Interpretative Ruling, the main provisions of which require the new source to meet the lowest achievable emission rate for the problem pollutant(s) and to obtain more than equivalent offsetting emission reductions (emission offsets) from existing sources. A source may be subject to PSD for one pollutant and to the Offset Ruling for another pollutant, or may affect both clean and dirty areas for the same pollutant.

At the present time, the Offset Ruling is generally carried out by the States as part of their own new source review procedures. In most areas, EPA's Offset Ruling will terminate as of July 1, 1979, and will be replaced by State-adopted new source review requirements. However, if States fail to adopt an acceptable plan to attain the NAAQS by the dates specified in the Clean Air Act, the Act requires that no permits for major new sources applied for after June 30, 1979 be issued.

The PSD program is generally being carried out by EPA through its Regional Offices. Thus, large sources must now

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[1] The criteria for determining the applicability of these more stringent requirements are actually more complex and can be found in the specific regulations mentioned below.

[2] See Federal Register of June 19, 1978, pp 26380-26410.

get a preconstruction permit from both the State (for offsets) and EPA (for PSD). However, many States will be developing their own PSD program, allowing the air permit program to be consolidated at the State level. Until this occurs, major source owners should obtain their State permit before applying to EPA for a PSD permit. It is recommended that source owners consult with both EPA and the States before submitting a permit application to determine what requirements will be applicable and what kind of information must be submitted. To avoid delays, major source owners should apply for a permit as early in their planning process as possible and should allow for a minimum of three months from the date of application for a permit to be issued.

Immediately Effective Changes Resulting from 1977 Clean Air Act Amendments

1. *Baseline.* In the December 21, 1976 Ruling, the baseline for determining emission offset credit was the SIP emission limitations in effect for existing sources (i.e., control of existing sources beyond that required by the SIP could be used to offset emissions from new sources). However, for areas where EPA had formally found the State plan inadequate and had requested revision, the baseline was the emissions that would result from application or reasonably available control measures (RACM) by existing sources. Furthermore, even where the baseline was the existing SIP rather than RACM, the 1976 Ruling provided for several adjustments to the baseline to take account of unusual circumstances. Explicit provisions were included to govern situations where there was no applicable SIP requirement, where offset credit would come from switching to cleaner fuels, and where the permitted emission level exceeded the uncontrolled emission factor of the source. 41 FR at 55529 cols. 2–3. In addition, EPA does not interpret the 1976 Ruling as allowing offset credit for tightening SIP requirements for a source to reduce the emission level allowed by the SIP down to the level allowed for the source by applicable new source performance standards (NSPS) or national emission

standards for hazardous air pollutants (NESHAPS) requirements (i.e., requirements under Sections 111 and 112, respectively, of the Act). Any other approach would allow offset credit for so-called "paper" reductions, where the SIP is adjusted but no actual tightening of requirements under the Act occurs. These special provisions all implement the general principle behind the 1976 Ruling, that offsets must ordinarily represent reductions in emissions below the emissions allowed by existing requirements.

Section 129(a)(1) of the Clean Air Act Amendments of 1977 (Pub. L. 95–95 (note under 42 U.S.C. 7502)) states that the 1976 Ruling, as it may be modified, shall remain in effect, except that the baseline for determining emission offset credit "shall be the applicable implementation plan of the State in effect at the time of application for a permit * * *." The legislative history indicates that this provision was intended to eliminate the provision in the 1976 Ruling that the baseline was RACM where EPA had called for a SIP revision. But this provision was not intended to displace the provisions under the 1976 Ruling to accommodate special circumstances, giving credit only for reductions below the emissions allowed by existing requirements.

For the foregoing reasons, the ruling is revised to eliminate the requirement that the baseline by RACM where EPA has called for SIP revisions.[3] EPA invites public comment on its policy that the Ruling does not allow offset credit for tightening SIP requirements down to NSPS or NESHAPS levels, and invites comment on whether the language of the Ruling establishing the baseline should be revised to make this policy more explicit.

2. *Nonattainment requirements under the amended Act.—a. Amendments required by nonattainment provisions of the*

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[3] The 1977 Amendments and legislative history clearly call for this Amendment. See 123 Congressional Record at S 9165 col. 2 (daily ed. June 6, 1977), therefore, EPA has determined that notice and public procedure are unnecessary before making this Amendment.

Act. New Part D of Title I of the Act[4] requires States to revise their SIP's for every area where an NAAQS is not being met. For each standard, areas were designated, under Section 107(d) and 171(2) of the Act, as either attaining the standard (attainment areas), violating the standard (nonattainment areas), or areas that cannot be classified on the basis of available information (unclassifiable areas).[5] For areas initially designated as nonattainment areas,[5] the deadline for States to submit required SIP revisions is January 1, 1979. Revised SIP's meeting the requirements of Part D must be in effect by July 1, 1979. For areas initially designated as attainment or unclassifiable but are later found to be nonattainment areas, additional time may be necessary for development, submittal and approval of the required SIP revisions.

The Act provides that the Ruling be superseded after June 30, 1979—(a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, or (b) by prohibition on construction under the Applicable SIP and Section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. The Ruling is now being amended to reflect this, and to state that the Ruling will remain in effect to the extent not superseded under provisions of the Act. The above prohibition on major new source construction does not apply to a source whose permit for construction or modification was applied for duing a period when the SIP was in compliance with Part D, or before the deadline for having a revised SIP in effect that satisifies Part D. The Ruling is amended to reflect this.[6]

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[4] Part D of the Act, which includes Sections 171 through 178 (42 U.S.C. 7501–7508).

[5] Initial designations were published by EPA on March 3, 1978, 43 FR 8962. Revisions to the initial designations were recently published for some States (43 FR 40412, 43 FR 40502, and 43 FR 45993, September 11 and 12, and October 5, 1978) and will soon be published for other States. Designations are codified at 40 CFR 81.300 *et seq.*

[6] These amendments to the Ruling do no more than state that the Act provides for supersession of this Ruling. Furthermore, it

b. *Additional effects of nonattainment requirements on this Ruling.* By its terms, this Ruling has always applied to proposed major sources and major modifications anywhere in the State that will cause or contribute to a violation of an NAAQS, regardless of whether the sources or modifications were within an area determined in general to be nonattainment. 41 FR 55528 col. 2. Designations of nonattainment, therefore, do not limit the areas within which this Ruling applies.

In EPA's view, the Act requires that for any area disignated [sic] as nonattainment for any NAAQS, the preconstruction review provisions under Part D, or the prohibition on construction under the applicable SIP and Section 110(a)(2)(I), must apply to all major sources within the State that will cause or contribute to a violation of the NAAQS within an area initially designated as a nonattainment area. Consequently, after July 1, 1979, the Interpretative Ruling will only apply in the following situations: (a) To sources in one State which contribute to a violation of an NAAQS only with another State, (b) during the time allowed for the development and approval and/or promulgation of revised SIP in an area which is subsequently determined to violate an NAAQS, and (c) during any extended time allowed under Section 110(b) for development of a SIP revision of an area that violates only a secondary NAAQS. Also, for sources in one state (which has an acceptable SIP) that would contribute to a violation in another State (which does not have an acceptable SIP), the restrictions on new source construction under the applicable SIP and Section 110(a)(2)(I) do not apply.

Under the preconstruction permit requirements in Part D, States have two basic options for dealing with proposed new

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is important to have a clear statement at this time of the earliest possible application of the prohibition on major new source construction, to assist industrial planning. For these reasons, EPA has determined that soliciting public comment before making these amendments would be unnecessary and contrary to the public interest.

major sources within a nonattainment area that cause or contribute to a violation of an NAAQS. The SIP may provide an allowance for growth while assuring reasonable further progress toward attainment, and new sources may be allowed that do not result (individually or in the aggregate) in emissions that exceed the allowance. If the growth allowance is used up, or if none is provided, the State's other option is to allow sources to be constructed only if case-by-case offsets are obtained sufficient to provide for reasonable further progress towards attaining the NAAQS by the attainment date prescribed under Part D. If the SIP for the nonattainment area is not being carried out, however, no permits may be issued within the area as required by Section 173(4).

The discussion in this notice of the requirements for revised SIP's under Part D, and for a prohibition on construction under the applicable SIP and Section 110(a)(2)(I), is provided to place the Ruling in perspective, and does not constitute regulations promulgated or final action taken by the Administrator to establish or interpret those requirements. Many of the approaches used by the Agency in revising the Ruling may be used by the States as guidance in developing provisions under Part D; but again, except as noted below, this does not constitute regulations or final action establishing or interpreting requirements for preconstruction review provisions. The Agency's nationally applicable policy summarizing the elements that a SIP submittal must contain to meet the requirements of Part D was published in the FEDERAL REGISTER on May 19, 1978, 43 FR 21673, and the discussion and guidance provided by this notice merely supplement that policy.

The only exception is that certain terms in the Ruling are also used in Sections 172(b)(6), 173, and 302(j) of the Act to prescribe the requirements for revised preconstruction review provisions. Therefore, the definitions in this ruling of the terms "source," "potential," and "modification" (see discussion below on additional flexibility in defining "modification") apply to the statutory requirements for preconstruction review provisions under Sections 110(a)(2)(I) and Part D as well as

under this Ruling. The discussion below of "lowest achievable emission rate," and of cut-offs to limit review of small sources, also apply to State preconstruction review programs under Section 173 of the Act [although not to the prohibition on construction under Section 110(a)(2)(I)].

MAJOR SOURCE ISSUES

1. *Sources subject to review—a. Definition of "potential" to emit and definition of cutoff points.* Section 129(a) of the 1977 Amendments requires that the offset requirements be applicable to all major stationary sources (including Federal facilities) as defined in Section 302 of the Act (i.e., sources with potential emissions of 100 tons or more per year). The emission offset requirements currently apply to sources with *allowable* emissions greater than 100 tons per year. Since the 1977 Act Amendments did not define potential emissions and there has been some question as to the Congressional intent of this term, this change was not made immediately effective. However, this issue was dealt with in EPA's proposed regulations for preventing significant deterioration (PSD) of air quality (42 FR 26388). As set forth in the final PSD regulations, potential emissions are defined in terms of uncontrolled emissions but sources are exempt from the best available control technology and the air quality related tests if the source's allowable emissions would be less than each of the following cutoff points: 50 tons per year, 1000 pounds per day or 100 pounds per hour. The short-term criteria are included to ensure that a source that operates seasonally or intermittently is adequately dealt with regarding its impact on short-term air quality. For the same reasons as are discussed in the preamble to the PSD regulations, the Emission Offset Ruling is revised to require review of sources based on their uncontrolled emissions, but to exempt sources from the major conditions of the Ruling if the allowable emissions are less than the above cutoff points.

It should be noted that any source with allowable emissions less than the above amounts which is exempted from the offset requirements will use up part of the state's allocation

for growth (see discussion in preceding section) at the time such source begins operation. Thus, a State plan may need to require additional control of existing sources (or more rapid compliance) in order to achieve the "annual reasonable further progress toward attainment" required by the Act.

b. *Definition of "source."* A number of commenters indicated the need for a more explicit definition of "source." Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements.

The revised definition of "source" is only a clarification, and represents no change from EPA's intent in the December 1976 Ruling and the way the Ruling has been implemented. The definition is consistent with the use of this term in other SIP-related regulations (e.g., 40 CFR Part 51, Appendix C), and is identical to the approach recently adopted for the Prevention of Significant Deterioration (PSD) regulations (see 40 CFR 52.21 (b)(4), 43 FR 26388, June 19, 1978).

c. *Public comment.* Comments were originally solicited on the definition of cut-off points to limit review of small sources in the Advance Notice of Proposed Rulemaking published on December 21, 1976. 41 FR 55559. Comments were received on the definition of "source" in the 1976 version of this Ruling. The definitions of the term "potential" and "source," and the definition of cut-off points to limit review, were all the subject of extensive public comment in response to EPA's proposed PSD regulations, which contained an approach very similar to that adopted here. The definitions adopted here were based on all of this public comment, and EPA has determined that it is unnecessary to postpone adoption of these definitions

until after further comment is solicited and evaluated. However, since a major industrial group has requested another opportunity to comment on these important issues, EPA is inviting further comment on these definitions, particularly to identify any considerations that were not relevant in developing the PSD regulations, and any additional considerations relevant to the application of these definitions to requirements for new preconstruction review programs under Section 173. Any comments must be submitted on or before February 15, 1979.

d. *Applicability to modifications accompanied by emission reductions within the same source (intrasource offsets).* Some commenters suggested that the Ruling should be amended to exempt a modification of an existing source which increases allowable emissions by 50 tons per year, 1000 pounds per day, or 100 pounds per hour, or more if there are accompanying reductions within the same source (intrasource offsets) such that the net increase from the source is less than the above amounts, or even that there is a net decrease. It was even suggested that this exemption apply to the addition of new facilities at an existing source. Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The Agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost. However, as long as the emission Offset Interpretative Ruling remains operational, the exemption will not be allowed for the reasons stated below. The text of the Ruling is rewritten to state in positive terms that the exemption is not permitted. Since the 1976 Ruling invited public comment on the requirements for modifications, and since this amendment clarifies the original language without changing the substance, EPA has determined that additional notice and public procedure before making the amendment are unnecessary.

If the Ruling were amended in the suggested manner, a source owner could construct or substantially modify a facility by obtaining only part of the offsets ordinarily required and avoiding the other conditions required for major pollution sources in nonattainment areas prior to there being an adequate Part D implementation plan. This would conflict with several of the basic purposes of the Ruling, which are to assure that sufficient offsets be obtained to represent reasonable progress toward attainment of the applicable standard, that the new facilities meet the lowest achievable emission rate (LAER), and that other sources owned by the applicant be in compliance with the approved SIP or on acceptable compliance schedules. The need to reduce new emissions through these requirements is particularly great before revised plans under Part D are adopted and implemented. Therefore, it is not enough that there be no net increase in emissions; there are additional independent requirements which must be met. There is no reason to depart from this principle simply because offsets happen to come from a facility within the same source. Since the facility will be new or substantially modified, it has an opportunity to employe [sic] LAER and satisfy the other requirements like any other source subject to the Ruling. This has been the consistent application of this Ruling.

Unlike this Ruling, EPA's recently published PSD regulations include an exemption for modifications of existing facilities which are accompanied by sufficient intrasource offsets that there would be no net increase in emissions (see discussion at 43 FR 26394, June 19, 1978). EPA believes that the need to reduce new emissions as much as possible is greater under this Ruling for an area where standards are violated than under the PSD requirements for a clean area where deterioration is the only concern.

Modifications of existing facilities accompanied by sufficient intrasource offsets so that there would be no net increase in emissions may, however, be exempted by the States from the new source review procedures under Part D that will supersede this Ruling. This exemption would not be applicable

where a major facility is added to or is reconstructed at a source, whether the addition is to replace production capacity or for growth. The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 FR 21673–21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions. Consequently, for a plan approved and implemented under Part D, it is acceptable for the State to include the above exemption for intrasource offsets in its new source construction under the State plan and Sections 110(a)(2)(I) and 173(4) must apply to major modifications regardless of intrasource offsets if the plan is found not to satisfy Part D or is not being implemented, because in those instances the plan cannot be relied upon to assure reasonable further progress and, eventually, attainment.

* * *

The Interpretative Ruling published by EPA on December 21, 1976, at 41 FR 55524, is revised and codified as a new Appendix S to 40 CFR Part 51. In the footnote to 40 CFR 51.18 "41 FR 55528, December 21, 1976," is deleted and "Appendix S" is inserted in its place. As revised Appendix S reads as follows:

APPENDIX S—EMISSION OFFSET INTERPRETATIVE RULING

I. INTRODUCTION

This appendix sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution (not including indirect sources) Under 40 CFR 51.18 and Section 129 of the Clean Air Act Amendments of 1977. Pub. L. 95–95. (note under 42 U.S.C. § 7502. A major new source or modification which would contribute to a violation of a national ambient air quality standard (NAAQS) may be allowed to construct only if the stringent conditions set forth below are met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.

For each area designated as exceeding an NAAQS (nonattainment area) under 40 CFR 81.300 *et seq.*, this Interpretative Ruling will be superseded after June 30, 1979—(a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and Section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. The Ruling will remain in effect to the extent not superseded under the Act. This prohibition on major new source construction does not apply to a source whose permit to construct was applied for during a period when the SIP was in compliance with Part D, or before the deadline for having a revised SIP in effect that satisfies Part D.

II. INITIAL SCREENING ANALYSES AND DETERMINATION OF APPLICABLE REQUIREMENTS

A. *Definitions.* For purposes of this Ruling:

1. "Source" means any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties

and which is owned or operated by the same person (or by persons under common control).

2. "Facility" means an identifiable piece or process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

* * *

3. Proposed Rulemaking to Amend Definition of "Source" in EPA's PSD and Nonattainment Area Regulations to Conform to Court Decision (excerpted), 44 Fed. Reg. 51924 (September 5, 1979)

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Parts 51 and 52]

Requirements for Preparation, Adoption, and Submittal of SIP's; Approval and Promulgation of State Implementation Plans

AGENCY: Environmental Protection Agency.
ACTION: Proposed Rules.

SUMMARY: EPA proposes to amend its regulations for the prevention of significant deterioration 40 CFR 51.24, 52.21 (1978) in response to a court decision that overturned those regulations in major respects. EPA also proposes changes to its regulations affecting new source review in nonattainment areas, including restrictions on further major source growth and requirements under EPA's Emission Offset Interpretative Ruling, 40 CFR Part 51 App. S, and section 173 of the Act, to conform those rules to the court decision.
DATES: The deadline for submitting written comments is October 5, 1979.
ADDRESSES: *Comments.* Comments should be sent (in triplicate if possible) to Central Docket Section (A-130), Washington, D.C. Atten: Docket No. A–79–35.

Docket: In accordance with section 307(d), of the Clean Air Act, 42 U.S.C. 7607(d). EPA has established a docket for

this rulemaking. It bears Docket No. A–79–35. The docket is an organized and complete file of all significant information submitted to or otherwise considered by EPA during this rulemaking. The contents of the docket will serve as the record in the case of judicial review under section 307(b) of the Act, 42 U.S.C. 7607(b). The docket is available for public inspection and copying between 8 a.m. and 4 p.m., Monday through Friday, at EPA's Central Docket Section. Room 2903B. A reasonable fee may be charged for copying.

PUBLIC HEARINGS: EPA intends to hold public hearings on the proposals in this notice in September in San Francisco, California, and Washington, D.C. The exact times and places will be announced in due course.

FOR FURTHER INFORMATION CONTACT: Michael Trutna, Standards Implementation Branch (MD-15). Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711. 919/541-5292.

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I. Background

A. *Prevention of Significant Deterioration.* In 1974, EPA Promulgated regulations to prevent emissions of sulfur dioxide (SO_2) and particulate matter (PM) from significantly deteriorating air quality in areas where concentrations of those pollutants were lower than the applicable national ambient air quality standards (NAAQS). 39 FR 42510 (codified at 40 CFR 52.21 (1977)). EPA made those regulations part

of the State Implementation Plan (SIP). The prevention of significant deterioration (PSD) regulations prohibited the construction of any new source or modification in certain categories, unless EPA or a delegate state had issued a permit evidencing that the source or modification would apply "best available control technology" (BACT) for SO_2 and PM, and that emissions of those pollutants from the source or modification would not cause significant deterioration of air quality in any area.

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977 (1977 Amendments) into law. Pub. L. No. 9595.91 Stat. 685. Those amendments established a new set of PSD requirements as Part C of Title I of the Clean Air Act (Act). *See* Sections 160–169, 42 U.S.C. 7470–79. The new requirements follow the outline of the old regulations, but are more elaborate and in many ways more stringent. The 1977 Amendments also directed that each SIP was to contain the new requirements. *See* Sections 161, 110(a)(2)(D) and (J). 42 U.S.C. 7471, 7410(a)(2)(D) and (J).

In response to that mandate, EPA promulgated two sets of PSD regulations on June 19, 1978. One set specified the minimum requirements that a PSD SIP revision would have to contain in order to warrant EPA approval. 43 FR 26380 (codified at 40 CFR 51.24 (1978)) (hereinafter, the "Part 51 regulations"). The other set comprehensively amended the old PSD regulations and incorporated into them the new PSD requirements. 43 FR 26388 (codified at 40 CFR 52.21 (1978) (hereinafter, the "Part 52 regulations")). EPA intended that, until it had approved a PSD SIP revision for a state, the permitting of new sources and modifications to be constructed in its clean areas would continue under the new Part 52 regulations. The United States Court of Appeals for the District of Columbia Circuit subsequently affirmed that approach. *Citizens To Save Spencer County v. EPA*, 12 ERC 1961 (March 27, 1979).

Many industrial and environmental groups petitioned the same court for review of the substantive provisions of both the part 51 and Part 52 regulations. On June 18, 1979, the

court issued a decision that upheld some of those provisions and overturned others. *Alabama Power Company v. Costle*, 13 ERC 1225. In its opinion the court merely summarized its rulings, but promised supplemental, comprehensive opinions in due course, probably by "the end of this summer." *Id.* at 1227 n.7. The court also invited the parties to file petitions for reconsideration, several of which were filed but have not yet been acted upon. In an order that accompanied the summary opinion, the court stayed the effect of its decision until it had issued the supplemental opinions. The purpose of this procedure, the court explained, was "to enable EPA to proceed as soon as possible to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by (the court's) rulings, and to take other prudent action to effectuate congressional policies." *Id.* at 1227.

By this notice, EPA is beginning the process the court had in mind. It is here proposing various amendments to the PSD regulations. Some of those amendments would replace the provisions rejected by the court; others would add entirely new provisions to supplement the replacement provisions. Each of the proposals is discussed in detail in material which follows this background section.

B. *Requirements Relating to Nonattainment Areas.* The only regulations before the court in *Alabama Power* are EPA's PSD regulations. They are therefore the only regulations directly affected by the court's decision. However, several statutory definitions and other concepts addressed in *Alabama Power* are also relevant to the statutory requirements for areas where pollution exceeds the national ambient air quality standards (nonattainment areas). By this notice, EPA is proposing changes to its regulations for nonattainment areas, to conform the regulations to the decisions in *Alabama Power*.

There are three separate sets of nonattainment requirements affecting the review of new or modified major stationary sources, each applicable under a different set of circumstances. First, before July 1, 1979, EPA's Emission Offset Interpre-

tative Ruling (offset ruling) governed new construction that would cause or contribute to a violation of a standard. The offset ruling will still be effective in the future but only in a few, limited instances. The current, revised offset ruling was published by EPA on January 16, 1979. 44 FR 3274.

Second, after June 30, 1979, state plans which satisfy the requirements of Part D, Title I, of the Act (42 USC 7501 and following) are to be in effect for areas designated as nonattainment areas under section 107(d) of the act, 42 U.S.C. 7407 (d). EPA has published several notices about what constitutes an acceptable Part D plan revision. *See* 43 FR 21673 (May 19, 1978), 44 FR 8311 (February 9, 1979), 44 FR 20372 (April 4, 1979), 44 FR 25243 (April 30, 1979), 44 FR 38583 (July 2, 1979). In situations where a Part D plan was not due by July 1, 1979, the offset ruling continues to apply (*e.g.*, where a violation of an ambient standard is discovered in a designated attainment area, or where the deadline for a Part D plan for a secondary standard is postponed under section 110(b) of the Act, 42 U.S.C. 7410(b)).

Finally, for areas where Part D plans are due but where the plan either does not satisfy Part D or is not carried out in accordance with Part D, the Act in sections 110(a)(2)(I) and 173(4) provides for restrictions on major new source construction. 42 U.S.C. 7410(a)(2)(I) and 7503 (4). On July 2, 1979, EPA issued a ruling implementing this restriction, and invited comment on additional language to clarify how the statutory restriction will apply. 44 FR 38471, 38583, (July 2, 1979), 44 FR 42195, 42246 (July 19, 1979).

The key aspect of these nonattainment requirements that is affected by *Alabama Power* involves the definition of the new and modified stationary sources that are subject to stringent preconstruction permitting conditions. In the January 16, 1979 revision to the offset ruling, EPA adopted virtually the same definitions of "major source" and "major modification" as were adopted in the PSD regulations and were overturned in *Alabama Power*. EPA stated in the preamble to the offset ruling that those definitions were also applicable to state permitting programs required under Part

D. EPA also ruled that the definitions apply to the prohibition on construction under section 110(a)(2)(I) (except that the cut-offs to limit review of sources with low allowable emissions do not apply to section 110(a)(2)(I)). 44 FR at 3276 (col. 1).

Although the definitions were adopted as final action in the offset ruling, EPA invited additional comment.

The statutory language on which the "major source" and "major modification" definitions were based is very similar for the nonattainment programs as for PSD, and the reasoning in the June 18 *Alabama Power* decision generally appears to be applicable to both. The comments on the nonattainment definitions invited in the January 16 notice have therefore been rendered irrelevant by the court decision, and EPA is now proposing new definitions.

Those sections of this preamble which relate to the definitions of "major source" and "major modification" therefore discuss nonattainment requirements as well as the PSD regulations. Where the concepts and goals of nonattainment and PSD differ, we are proposing and seek comment on alternative approaches consistent with the distinctive goals of each. In addition, the discussion on "Geographic Applicability" addresses the nonattainment requirements. The court did not directly address the nonattainment requirements so EPA offers here two alternative approaches for comment.

Because of the importance of resolving these questions expeditiously, today's proposal does not have an accompanying economic impact evaluation. Such an evaluation will be performed and be made available for public comment prior to promulgation.

The discussion which follows first highlights the proposed PSD and nonattainment changes and then focuses in detail on each of them.

II. Highlights

A. *Proposed Regulations Affecting New Source Review in Both Nonattainment and PSD Areas:*

1. *Potential to Emit*: The regulations proposed today would

again make major construction projects subject to new source review (NSR) on the basis of increased potential to emit. Under the proposal the annual emission potential of a source would be determined after the application of air pollution controls rather than before as was generally done under the existing regulations. In calculating annual potential emissions of a source, maximum annual rated capacity, year-round hours of operation, and any enforceable permit conditions on the type of materials combusted or processed will be used.

2. *Fugitive Emissions*: Fugitive emissions, as proposed, means those emissions released directly into the atmosphere without passing through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions are proposed not to be considered when determining the annual emissions potential of a stationary source except when such emissions come from specified industry types.

3. *Source*: Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. "Building, structure, facility or installation" means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out. "Building, structure, or facility" means plant and "installation" means the individual emission unit within the plant for these nonattainment review situations. The manner in which source is defined places a vital role in determining when NSR would apply. When installation is defined differently than facility, more changes at major stationary sources would be subject as major modifications (see below).

4. *Major Modification*: The proposal would subject changes in the design or operation of a major stationary source to NSR only if (1) a significant net increase in the potential emissions of a pollutant for which the source is major would occur, or (2) cumulative net increases in the potential emissions of a pollutant regulated under the Act occur at the same source after the applicable NSR time of concern that in total would exceed the applicable 100/250-ton threshold. The proposal, unlike the existing regulations, would allow certain

emission reductions occurring at the same source to offset any increases due to proposed construction and avoid review. If a source has the potential to emit more than it is legally allowed to emit, no offset credit could be taken by a source for reducing its potential emissions down to the allowed level.

5. *No Tiered Review*: Under the existing regulations, only those sources and modifications which have large uncontrolled emission potential and also increased allowable emissions equal to or greater than 50 tons per year would receive a detailed review. All major sources and major modifications are now fully covered as discussed elsewhere.

6. *Preconstruction Notice*: Under the proposed regulations, an owner or operator of certain sources would be required to give written preconstruction notice to the applicable reviewing authority in lieu of getting a permit. This requirement would apply to (1) construction not qualifying as major modifications due to sufficient offsetting emission reductions, (2) emission reductions to be used for future offset credit in (1), and (3) construction not qualifying as major stationary sources due to application of air pollution controls not generally required by the SIP or 40 CFR Parts 60 and 61. The notice would contain a schedule of the applicable emissions changes and a demonstration that the proposed reductions are or would be sufficient and enforceable.

B. *Proposed Changes Specific to Nonattainment Requirements.*

1. *Major Modification*: The same basic definitional structure for "major stationary source" and "major modification" is being proposed for both nonattainment requirements and PSD requirements. The principal difference is the extent to which emission decreases may be used to offset increases at the same major stationary source to determine whether the source is "modified" and needs a permit.

a. *Emissions Baseline for Modification*: The proposed regulations would generally subject a change at a major source to review only if a significant net increase in the potential to emit a nonattainment pollutant for which the source is major. An exception is that no credit may be taken

for reducing those potential emissions which are greater than allowable emissions. In nonattainment areas where the offset ruling or Part D NSR would apply, the applicable SIP would generally define the allowable emissions baseline for reduction credit.

b. *"Bubble" Exemption*: The use of offsets inside the same source is called the "bubble." EPA proposes use of the definition of "source" (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of "installation" as an identifiable piece of process equipment. New or modified major-source installations would require NSR permits regardless of any offsetting emission reductions elsewhere in the facility. A change or a series of changes that do not result in a significant net increase in the installation's potential to emit and do not constitute a reconstruction of the installation, will not be subject to NSR permitting requirements.

iii. The offset ruling is proposed to also include a definition of "installation" with the effect described in paragraph ii.

iv. The restriction on construction for inadequate Part D SIPs (or failure to carry out the same) under section 110(a)(2)(1) is proposed to include a definition of "installation." However, unlike the situation described in paragraph ii, no bubble will apply, and any significant increase in the nonattainment pollutant for which the source is major would be subject.

2. *Regulatory Transition*: EPA intends to promulgate regulations within 90 days after issuance of the final *Alabama Power* opinion by the U.S. Court of Appeals. Such changes would generally apply to any future permitting situations after promulgation, but sources compelled to meet more restrictive requirements under the old regulations may apply

to the applicable permitting authority to reevaluate such requirements. A change in a permit which would make the SIP no longer adequate to demonstrate attainment would require an accompanying SIP revision to ensure attainment would not be jeopardized.

The proposed changes also affect how state adopted NSR programs may be approved for designated nonattainment areas. EPA generally proposes to approve any state plan that would meet the existing SIP approval criteria or the criteria proposed today. Restrictions on growth would be implemented using the existing definitions affecting source applicability until today's regulations are promulgated.

3. *Geographic Applicability*: The proposed regulations would apply the applicable nonattainment NSR requirements throughout the area designated as nonattainment. The existing regulations now allow a source within a designated nonattainment area to demonstrate that it would construct in a clean portion and affect significantly no dirty portion of the nonattainment area. Growth prohibitions, Part D, or the offset ruling would also apply when a proposed major source or major modification in a clean area would significantly impact a nonattainment area.

* * *

VIII. Source/Facility Installation

A. *Definition of "Source"*. In its existing PSD regulations and the offset ruling, EPA has defined "stationary source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." EPA also defined "facility" as an "identifiable piece of process equipment." 40 CFR 51.24(b)(4), (5), 52.21 (b)(4),(5); 40 CFR Part 51, Appendix s, sections II.A.1 and 2, as amended 44 FR 3282.

In *Alabama Power* the court said that the definition of "stationary source" in section 111(a)(3) governs PSD review. Slip op. at 11. Section 111(a)(3) defines "stationary source"

as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411 (a)(3). The court stated that EPA may not add items to this list. Slip op. at 11. In conformance with the court's opinion EPA is proposing to delete the terms "equipment," "operation" and "combination thereof" from the definition of stationary source in both the PSD and nonattainment regulations. The court also found that EPA exceeded its statutory authority in the way in which it tried to apply preconstruction review to both a *single* building, structure, facility or installation, which is permitted by section 111(a)(3), and a *combination* of such units. Slip op. at 12. EPA therefore proposes to delete the term "combination thereof" from the definition of stationary source.

The court did, however, state that EPA has substantial discretion to define the terms in the definition of source—that is, building, structure, facility, or installation—to include a wide range of pollution-emitting sources. Slip op. at 11. The components of "source" could be defined differently for PSD purposes than for the purposes of other provisions of the Act. Slip op. at 12, note 13. The key constraint on EPA's discretion is that "the definitions, applicable to each set of provisions must be reasonably appropriate for the purposes of those sections." *Id.* The same court has earlier stated that, in defining the components of source, "EPA is guided by a reasoned application of the terms of the statute it is charged to enforce, not by an abstract 'dictionary' definition." *ASARCO, Inc.* v. *EPA*, 578 F.2d 319, 324 note 17 (D.C. Cir. 1978). These two court opinions instruct the Agency to analyze the statutory purposes of the various PSD and nonattainment NSR provisions and define the terms "building," "structure," "facility," and "installation" to carry out best the statutory intent of the provisions.

B. *Sources Subject to PSD Requirements.* One of the fundamental purposes of PSD is to maintain air quality better than the ambient standards. This purpose can best be served if NSR applies to the largest industrial grouping that, as a practical matter, industry and the reviewing authorities can

reasonably deal with as a single unit. EPA believes the appropriate grouping is all emitting activities on contiguous or adjacent property and under common control—typically an industrial plant.

For PSD, EPA believes that a large industrial grouping is the appropriate unit for review of both construction of new plants and new and modified pieces of process equipment at existing plants. Applying PSD review to large groupings rather than separate pieces of process equipment ensures adequate review of new plants. EPA believes that unit-by-unit review, without plant-wide review, would fail to protect air quality standards and increments. Large new plants could be constructed at one site as a collection of individual process units, each below the potential-to-emit threshold, and thereby escape review altogether. If clustering of new growth were permitted without preconstruction review, increments and even standards could easily be violated.

While increased protection of air quality might be achieved by reviewing groupings even bigger than a plant, review of larger groupings is infeasible. New units not on adjacent property or under common control would be an awkward grouping to evaluate and regulate. Therefore, PSD review will apply to groupings of new construction no larger than a plant.

Plant-wide review also serves the basic purposes of PSD when pieces of equipment are being built or modified at existing plants. With plant-wide review, industry can construct new and modified equipment without a permit, by reducing emissions enough that net emissions at the plant do not increase. (Allowing use of offsetting emission reductions within the source to avoid NSR is called the "bubble" approach. For discussion of the bubble, see "Modification"). The purposes of PSD are served, because assuring that there will be no net increase in emissions from the plant also assures that the construction will not interfere with maintaining good air quality.

Permitting offsets only within individual process units would go beyond maintaining the status quo. While additional

emission reductions beyond existing levels are needed to attain standards in nonattainment areas (see discussion in the next section), such reductions are ordinarily unnecessary to meet the purposes of the PSD program. In addition, the review itself would not make sense relative to RSD goals, if new units at sources with offsetting plant-wide decreases were forced to undergo review. Sources might be required to model and monitor increment consumption when air quality is expected to improve or stay the same. In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity.

Since obtaining offsets is often less expensive and less time-consuming than obtaining a PSD permit, providing industry with the offset option will facilitate upgrading of production capacity, and encourage application of improved controls to obtain offsets. Permitting plant-wide use of offsets provides the greatest opportunity for both of these desirable results. Thus, plant-wide review is the preferred approach under PSD for reviewing construction of both new plants, and new and modified pieces of equipment at existing plants.

For these reasons, EPA proposes that PSD review apply to a large grouping of pollutant-emitting activities, like an industrial plant. To accomplish this, EPA proposes to define "building, structure, facility, or installation" to mean a grouping of activities on contiguous or adjacent properties and under common control. The term "grouping" is intended to include a plant consisting of a single isolated activity, as well as a plant consisting of many activities.

C. *Sources Subject to Nonattainment Requirements.*

1. *Purpose to be Served by Nonattainment NSR Definitions.* Unlike the PSD provisions, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR. To assure adequate review, EPA believes that both entire plants and individual pieces of equipment must be subject to NSR. The one

exception under EPA's proposal is for areas subject to fully complete SIPs satisfying Part D requirements. In these areas, where attainment is assured, NSR need apply only to entire plants.

To assure adequate review of new plants, a large grouping must be subject to nonattainment NSR for the reasons discussed above for PSD. To do otherwise would allow a new plant that is divided into separate process units, each below the potential emission threshold, to escape review. New emissions could thus be added to the existing violation, without review, making attainment virtually impossible. Therefore, EPA believes that nonattainment programs, like PSD programs, must apply NSR to entire plants.

EPA believes that pieces of process equipment within plants should also be subject to *NSR* under nonattainment programs. This would prevent use of plant-wide offsets for increases from construction or modification of major pieces of process equipment. The plant-wide bubble is less appropriate for nonattainment programs than for PSD programs, because it only holds emissions constant. Nonattainment programs, in contrast to PSD programs, must positively reduce emissions.

If increases from construction of new or modified pieces of process equipment could be offset on a plant-wide basis the construction would make attainment of the standards substantially more difficult. For each nonattainment area, there are only a limited number of cost-effective ways to reduce existing emissions enough to attain standards. If the cost-effective opportunities to reduce emissions are used to offset equally large increases from new construction, then other, less cost-effective ways to reduce emissions must be found to achieve attainment.

Therefore, to ensure that construction within existing plants does not make attainment of the standards more difficult, nonattainment programs must provide for NSR new and modified pieces of equipment. The NSR requirements will assure that the most stringent controls are applied to new and modified equipment, and that more than offsetting

reductions in existing emissions are obtained to assure adequate continued progress toward attainment. The nonattainment requirements also ensure that other sources in the state, owned or operated by the same owner, are in compliance with SIP requirements needed for attainment.

This policy argument is strongly supported by the legislative history. Even where demolition of obsolete equipment reduces emissions, Congress indicated that construction of replacement equipment should be subject to NSR under nonattainment programs without regard to the offsetting reductions:

> Thus, [under the offset ruling and Part D NSR requirements,] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.[4] (Statement of Senator Muskie, 123 Cong. Rec. at S 13702 col. 2 [daily edition, August 4, 1977]).

2. *Proposed Definitions.* To implement this specific expression of Congressional intent, as well as the general purposes of the nonattainment provisions discussed above, EPA is proposing to define "source" to include not only plant-wide groupings of activities, but also individual pieces of process equipment. "Building, structure or facility"[5] would be defined as a large grouping of activities (a plant) and "installation" would be defined as an "individual piece of process equipment."

These definitions would prevent use of plant-wide bubble for all new and modified major pieces of process equipment. ("Major" means having high enough potential emissions to be a major stationary source. "Minor" means having less than that.) The plant-wide bubble would still serve to avoid NSR, when emissions from a new or modified *minor* piece of equipment (or from some activity like a coal pile that is not

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[4] Then, as now, "facility" was defined in EPA's offset ruling as a piece of process equipment.

[5] Referred to hereafter as "facility."

an installation) are offset by enough reductions at the plant so that there is no net increase in emissions at the plant. Furthermore, in accordance with the Congressional intent noted above, a replacement of an older piece of equipment would be treated as a new installation, regardless of any reductions from previous emission levels. A "reconstruction" would be treated in the same way as a replacement, when the capital cost of the new improvements exceeds 50% of a comparable replacement.

The proposed definitions tend to limit applications of the bubble, by defining certain large kinds of sources and certain small kinds of sources, and recognizing that some small sources are included within the boundaries of large sources. This approach is consistent with both the language of the Act and the interpretation in *Alabama Power*.

Congress, in defining "source" as any "structure, building, facility, or installation" must have contemplated that some of these components could be defined to be smaller than others and that the small components could be found within the large components. Defining some sources as small enough to be within the boundaries of larger-defined sources is also consistent with the court's instruction not to define source as a "combination" of facilities, installations, or other single source units. The proposed regulations define "facility" not as a combination of narrowly-defined sources, but rather as an independently-defined enitity. [sic] This single entity is composed of a grouping of emitting activities (which individually may or may not be sources)[6] meeting requirements of common control and adjacency. This plant definition is exactly

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[6] For example, a coal pile is not a piece of process equipment, and is, therefore, not an "installation" under the proposed definitions. However, it is an emitting activity, and can therefore be part or a "facility" under the proposed definitions. The Agency recognizes that the emissions from the coal pile would be fugitive emissions and subject to regulation as discussed in the section on "Fugitive Emissions."

the sort of "common sense industrial grouping" that the court said is a proper subject for NSR. Slip op. at 12.

The court stated that the same definitions of facility, building, structure, and installation, must govern the determination of not only whether there is a new major stationary source subject to NSR, but also whether there is a *modified* major stationary source subject to NSR. Slip op. at 21. EPA's definitions adhere strictly to this principle. Major facilities and major installations constitute both the new sources and the modified sources subject to NSR. Under these definitions, construction that is neither a new nor a modified major facility may be a new or modified installation, and vice versa. Congress, in defining "source" to include several items in the alternative, provided for such a result where necessary to achieve the purposes of the Act.

The following illustrates how the nonattainment NSR definitions would work. Suppose a firm proposed to construct three pieces of process equipment on a single plant site. Each piece of equipment would be an "installation," and the entire plant would be a "facility." Each installation would be a "source" and the entire facility would be a "source." If the installations would have annual potential emissions of 40, 190, and 150 tons per year, respectively, the facility would have potential emissions of 380 tons per year:

Installation (A)—40 tons per year (minor source).
Installation (B)—190 tons per year (major source).
Installation (C)—150 tons per year (major source).
Facility (A)—380 tons per year (major source).

Permits would be needed for the three major sources: Installation (B), Installation (C), and Facility (A). Since the permit for Facility (A) would, as a practical matter, cover all three installations, only a single permit application would be needed.

Suppose next that the firm proposed to modify Installation (C) to increase emissions by 70 tons, and decrease contemporaneously the emissions of Installation (B) by the same amount. There would be no modification of Facility (A), whose

total emissions would remain the same, but there would be a modification of Installation (C), whose emissions would increase by 70 tons. A permit would be needed for the modification of Installation (C).

If installation (B) were then modified to increase its emissions by 50 tons, but there were contemporaneous reductions of the same amount at the same Installation (B), no net increase in emissions would occur at either Installation (B) or at Facility (A) (technically, there would be no "modification"), and no permit would be needed. If there were a 20-ton increase at Installation (A) and a contemporaneous 25-ton decrease at Installation (C), there would be a modification of minor Installation (A), whose net emissions increased, but no modification of major Facility (A), whose net emissions decreased, and no permit would be needed.

3. *Nonattainment Programs to Which the Proposed Definitions Apply.* The definitions described above are to apply to sources subject to the offset ruling and to restrictions on construction under sections 110(a)(2)(1) and 173(4) of the Act. EPA also proposes that these definitions apply to "incomplete" state plans under Part D of the Act. Incomplete plans are those that do not yet show reasonable further progress and attainment of the ambient standards, based exclusively on currently adopted, approved, and enforceable requirements. Incomplete plans therefore include any plan where approval under part D is conditioned on submission of additional material by the state, any plans containing state-adopted schedules for submission of additional material,[7] and any plans where additional submissions are needed by July 1, 1982, as required by section 129(c) of the 1977 Amendments (note under 42 U.S.C. 7502). Since incomplete plans do not yet include all requirements needed for attainment, EPA believes that the definitions described above, including the definition of "installation," are needed for the reasons discussed above.

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[7] For a discussion of conditional approvals and schedules, see 44 FR 20372 (April 4, 1979) and 44 FR 38583 (July 2, 1979).

However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. *See* 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment. Protection of attainment under the SIP is also assured by not permitting offset credit for emission reductions required by the approved SIP (see "Modification").

However, for sources subject to restrictions on construction in sections 110(a)(2)(I) and 173(4), EPA believes that no offsets should be permitted.[8] EPA proposes to accomplish this through the definition of "major modification," rather than the definition of the components of "source." This is discussed in the section on "Modification."

EPA is considering one other approach for nonattainment areas. Under this approach, all components of "source" would be defined as pieces of process equipment, and none would be defined as plants. NSR would apply to new pieces of equipment, regardless of offsets elsewhere in the plant. For modifications of existing pieces of equipment, offsetting reductions within the same piece of equipment could be considered in determining whether there is a significant net increase in emissions. However, under this alternative approach, new

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[8] Reconstructed major installations, regardless of whether they are considered "modifications" even under the restrictive definition of major modification, are new major sources subject to the restrictions on construction.

or modified minor installations would never be subject to review, regardless of whether they are part of a major plant.

Since numerous individual pieces of process equipment typically have less than 100 tons per year potential, and would escape preconstruction review even though they are part of a single plant with other 100 tons potential emissions, this approach would allow much new construction to take place without preconstruction review. This problem could be counteracted somewhat, by requiring that state plans provide for close tracking of new minor source construction. However, as discussed above, EPA believes that failing to review entire new plants would create enough risk of massive new emissions that this approach is undesirable.

D. *Summary.* In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

In addition, for the restrictions on construction, EPA is proposing to define "major modification" so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR regardless of whether they are within a major plant.

EPA invites comment generally on what approach should be used for each type of program.

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4. Final Rule Amending Definition of "Source" in EPA's PSD and Nonattainment Area Regulations (excerpted), 45 Fed. Reg. 52676 (August 7, 1980)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, and 124

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.
ACTION: Final rules.

Begins at 45 Fed. Reg. 52676

* * *

IX. Source

A. Proposed Definitions of "Source"

In the 1978 PSD regulations, EPA defined "source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." The Offset Ruling contained the same definition of "source."

In its June 1979 opinion in *Alabama Power*, the Court of Appeals rejected the definition of "source" in the PSD regulations. It concluded that Congress intended section 111(a)(3) of the Act to govern the definition of "source" for PSD purposes. That section defines "source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." In defining "source," EPA used the terms "building," "structure," "facility," and "installation," but then added "equipment," "operation," and "combination thereof." The court held that EPA, in adding those terms, exceeded its authority. It stated, however, that the Agency has sub-

stantial discretion to define one or more of the four terms in section 111(a)(3) to include a wide range of pollutant-emitting activities.

In its June opinion, the court also focused on the clause "which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or persons under common control)." The court held that the approach, which that clause embodied, of grouping pollutant-emitting activities solely on the basis of proximity and control is generally acceptable, since the Agency had "evidenced an intention to refrain from unreasonable literal applications of the definition and instead to consider as a single source only common sense industrial groupings." 13 ERC at 1230.

In September 1979, EPA proposed to define "building, structure, facility and installation" for PSD purposes as "any grouping of pollutant-emitting activities which are located on one or more contiguous or adjacent properties and which are owned or operated by the same person (or by persons under common control)." As the preamble to the September proposal explains in detail, EPA concluded that the proposed definition would serve the purposes of PSD adquately [sic] by requiring review of those major projects that would cause air quality deterioration. At the same time, the definition would operate to avoid review of projects that would not increase deterioration significantly. In EPA's view, the dominant purpose of PSD review is to maintain air quality within the applicable increments.

In September, EPA proposed to define the four component terms differently for nonattainment purposes. Specifically, the Agency proposed to define "building, structure and facility" as it had proposed to define them for PSD purposes, and "installation" as "an identifiable piece of process equipment." One effect of that proposal would be the application of nonattainment requirements to a new piece of equipment that would emit significant amounts of a pollutant for which the area had been designated nonattainment, regardless of any accompanying emissions offsets at the plant. The pream-

ble to the proposal explained: "Unlike the PSD provision, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR." 44 FR 51932. EPA proposed to apply this definition to "incomplete" SIPs, i.e., those which did not demonstrate attainment based exclusively on currently approved requirements. Fully "complete" SIPs could, under EPA's proposal, use the PSD definition.

In December 1979, the court issued its final opinion on the 1978 PSD regulations, which opinion superseded the June 1979 opinion. In the December opinion, the court reaffirmed its earlier conclusions that EPA must adhere to section 111(a)(3) in defining "source" for PSD purposes and that EPA has discretion to define the component terms "reasonably to carry out" the purposes of PSD. 13 ERC at 2039. The court added that "a plant is to be viewed as a source" and that the Agency "should" provide for the aggregation of polluting-emitting activities "according to considerations such as proximity and ownership." *Id.* at 2039 and 2040. But it warned that "EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms." Finally, the court said that any new definitions "should also provide explicit notice as to whether (and on what statutory authority) EPA construes the term source, as divided into its constituent units, to include the unloading of vessels at marine terminals and 'long-line' operations such as pipelines, railroads, and transmission lines. We agreed with Industry Groups that EPA has not yet given adequate notice as to whether it considers those industrial activities to be subject to PSD." *Id.* at 2040.

In January 1980, EPA solicited comment on the September proposals in light of the December opinion of the court. 45 FR 6803. EPA specifically asked for comment on whether factors other than proximity and control, such as the functional relationship of one activity to another, should be used. The Agency also asked for specific examples of cases where a

literal application of the proposed definition would be unreasonable.

B. PSD: Comments on Proposal and Responses

Most commenters agreed that for PSD purposes EPA should adopt definitions of "building," "structure," "facility," and "installation" that would aggregate pollutant-emitting activities, instead of definitions that would restrict one or more of those terms to an individual activity. One commenter, however, argued that EPA should adopt for PSD purposes the same definitions of those terms that it had proposed to adopt for nonattainment purposes. The commenter asserted that the decision of the court in *ASARCO* v. *EPA*, 578 F. 2d 319 (D.C. Cir. 1978), required the Agency to impose BACT on a new unit at a plant, even if the unit would result in no net increase in emissions. The commenter also asserted that the "all-encompassing definition * * * destroys the intent of the PSD program by letting opportunities for *reducing* increment consumption disappear before control technology standards (*i.e.*, NSPS) can be in place." (Emphasis added.)

EPA has decided to adopt for PSD purposes the sort of "all-encompassing" definitions that the commenter opposed. First, in its December 1979 opinion in *Alabama Power*, the court explicitly held that *ASARCO* "does not prevent aggregation of individual units of a plant into a single source." 13 ERC at 2040. Second, the dominant purpose of PSD review is not to reduce increment consumption, but rather to maintain air quality deterioration below an applicable increment. A definitional structure that aggregates pollutant-emitting activities into one "source" would serve that purpose, since it would allow only those changes at the "source" that would not significantly worsen air quality to escape review.

Some of the commenters who agreed that each of the component terms of "source" should aggregate pollutant-emitting activities also supported the use of proximity and control as the sole criteria for aggregating them. Most of those commenters, however, objected to the use of proximity

and control as the sole criteria, some on the ground that the proposed definitions would be too inclusive and others on the ground that the definitions would not be inclusive enough.

The commenters who thought the definitions would be too inclusive asserted that they would group sets of activities at one site and under common control that are functionally or operationally distinct. Typical of the examples they gave are the following activities at one site and under common control: (1) a surface coal mine and coal-burning electrical generators that the mine supplies with coal; (2) a rock quarry and the portland cement plant that the quarry supplies with raw material; (3) a primary aluminum ore reduction plant, an aluminum fabrication plant and an aluminum reclamation plant; (4) a refinery, a service station, a research laboratory, a fertilizer factory, and a pesticide factory; and (5) a uranium mill and an oil field. With the language of the June 1979 opinion in mind, the commenters contended generally that to group the nominally different activities in each of those examples would violate any common sense notion of "plant."

The commenters who thought the proposed definitions would be too inclusive suggested a wide range of alternative definitions. For example, one group proposed that activities at one site and under common control should be combined only if: (1) they share the first three digits under the Standard Industrial Classification Code of the U.S. Department of Commerce, (2) they are dependent upon or affect the process of each other, (3) they use a common raw product or produce a common product, and (4) the proponent of the project in question does not show that the activities have entirely separate air quality impacts.

The commenters who thought the proposed definitions would not be inclusive enough urged the Agency to abandon control as a factor and adopt function in its place. Some of them described a plan by a group of independent companies to construct jointly a single coal-burning power plant to replace oil-burning power plants at various manufacturing sites belonging to those companies near to the site of the coal-burning plant. The commenters contended that EPA

should treat the old plants and the new plant as being within one "source," so that the new plant might escape PSD review. They argued that the new plant would not deteriorate air quality, since presumably the decrease in emissions from the shutdown of the old plants would offset the increase from the new plant, and that to allow it to escape review would facilitate the national switch from oil to coal.

After considering the comments of those who objected to the use of proximity and control only, EPA has decided to adopt for PSD purposes a definition of "building, structure, facility, and installation" that is different from the one it proposed in September. The final definition provides that those component terms each denote "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (*i.e.*, which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively)."

In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

The comments on the proposed definition of "source" have persuaded EPA that the definition would fail to approximate a common sense notion of "plant," since in a significant number of cases it would group activities that ordinarily would be considered as separate. For instance, a uranium mill and an oil field would ordinarily be regarded as separate entities, yet the proposed definition would treat them as one.

In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.

EPA has chosen the classification code in the *Standard Industrial Classification Manual, 1972*, as amended in 1977 ("*SIC*"), because it is both widely-known and widely-used. EPA has also chosen to use just one set of categories in the manual, those that describe each "Major Group" in the classification system and that bear a two-digit classification number, although the commenter who suggested that EPA use such a code also suggested that the Agency use the categories at the three-digit level. On the one hand, the two-digit categories are narrow enough to separate sets of activities into common sense groupings. In fact, most of the nominally different sets of activities in the examples given above would fall into a different two-digit category; only the fertilizer factory and the pesticides factory would fall into the same category. On the other hand, the categories are broad enough to minimize the likelihood of artificially dividing a set of activities that does constitute a "plant" into more than one group and the likelihood of disputes over whether a set of activities falls entirely into one category or another.

Each source is to be classified according to its primary

activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support. For example, a boiler might be used to generate process steam for both a commonly controlled and located kraft pulp mill and plywood manufacturing plant. If the yearly boiler output is used primarily by the pulp mill, then the total emissions of the boiler should be attributed to the mill.

In adopting the new definition of "source," EPA rejected the requests of those commenters who thought that the proposed definition would not be inclusive enough. As noted above, they urged that EPA formulate a definition that looked only to proximity and *function*. But such a definition by looking to function would unnecessarily increase uncertainty and drain the Agency's resources. In addition, such a definition would present groupings, such as the example the commenters gave, that would severely strain the boundaries of even the most elastic of the four terms, "building," "structure," "facility," and "installation."

Many commenters urged EPA to clarify the extent to which the final definition of those terms encompasses the activities along a "long-line" operation, such as a pipeline or electrical power line. For example, some urged EPA to add to the definition the provision that the properties for such operations are neither contiguous nor adjacent. To add such a provision is unnecessary. EPA has stated in the past and now confirms that it does not intend "source" to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one "source."

EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The

Agency can answer that question only through case-by-case determinations. One commenter asked, however, whether EPA would treat a surface coal mine and an electrical generator separated by 20 miles and linked by a railroad as one "source," if the mine, the generator, and the railroad were all under common control. EPA confirms that it would not. First, the mine and the generator would be too far apart. Second, each would fall into a different two-digit *SIC* category.

Three commenters focused on whether and to what extent the emissions from each ship that would dock at a proposed marine terminal should be taken into account in determining whether the terminal would be "major" for PSD purposes. One commenter argued in effect that the emissions of each such ship that are quantifiable and occur while the ship is coming to, staying at or going from the terminal should be taken into account. In the view of that commenter, all of those activities would be "integral" to the operation of the terminal. Another commenter asserted that none of the emissions of any such ship should be taken into account, because ships are mobile sources. The remaining commenter contended that only the emissions that: (1) come from a ship which is under the proprietary control of the owner or operator of the terminal and (2) occur while the ship is at the dock should be included in an applicability determination. That commenter viewed the ability of the terminal owner or operator to regulate the behavior of a ship as the critical consideration.

The permit requirements of the final Part 52 PSD regulations apply to a collection of pollutant-emitting activities according to the "potential to emit" of just those activities in that collection which constitute a "stationary source." Whether and to what extent the emissions of ships that would dock at a terminal are to be taken into account in determining PSD applicability depends, therefore, on whether and to what extent the term "stationary source" in the final regulations encompasses not only the activities of the terminal itself, but also the activities of the ships while they are coming to, staying at, or going from the terminal.

The final definition of "building, structure, facility, and installation" resolves that question. EPA intends the term "stationary source" under that definition to encompass the activities of a marine terminal and only those dockside activities that would serve the purposes of the terminal directly and would be under the control of its owner or operator. The term "dockside activities" means those activities in which the ships would engage while docked at the terminal. While "stationary source" encompasses combinations of activities, it is limited to combinations that would be "stationary," that is, fixed to the particular site. The activities of a terminal itself would be stationary, but all ship activities would not be. Only those that would directly serve the purposes of the terminal, such as loading and unloading, would be stationary since they alone would be in a sense fixed to the particular site. Hence, "stationary source" encompasses the activities of a marine terminal and only those dockside activities that would directly serve its purposes.

In addition, while "stationary source" encompasses combinations of stationary activities, it is further limited to those that would locate on "contiguous or adjacent properties." In EPA's view, only dockside activities would be located on "property" that is contiguous or adjacent to the terminal. Next, "stationary source" is also limited to those combinations of activities that would be "under the control" of one person or one group of persons who are themselves under common control. Hence, "stationary source" encompasses only the activities at a terminal and those dockside activities over which the owner or operator of the terminal would have control. Finally, the activities at a terminal and any such dockside activities fall under a single two-digit *SIC* category, namely "Water Transportation" (number 44).

Whether a particular dockside activity would directly serve the purposes of a terminal and would be under the control of its owner or operator depends upon the circumstances of a specific situation. Presumably, however, the activity of loading or unloading a ship would in every case directly serve the purposes of the terminal and would be under the control

of its owner or operator to a substantial extent. In particular, the Agency would expect that no loading or unloading could occur without the consent of the owner or operator and consequently that the owner or operator would set, or at least have a significant say in the setting of, the schedule for loading or unloading.

In adopting this interpretation of "stationary source," EPA in large measure has rejected the arguments of the commenters on the ship emissions issue. First, to treat *all* of the activities of a ship while it is coming to, staying at, and going from a terminal would violate any common sense notion of "building," "structure," "facility," or "installation." To group just those activities occurring at the terminal that are essential to its functioning entirely comports with common sense. Second, an activity such as loading and unloading is certainly stationary, even if the ships that engage in it have mobility. Ships, moreover, are not "mobile sources" within the meaning of section 110(a)(5) of the Act, the provision restricting indirect source review. Finally, the fact that a terminal owner or operator does not own a particular ship does not mean that the owner or operator has no control over behavior of the ship at the terminal.

In deference to the position taken in *Alabama Power*, EPA has decided to treat the definition of "source" in the 1978 PSD regulations as *not* encompassing any ship or ship activity. As a result, ship emissions are not to be taken into account at all in determining whether a marine terminal is subject to review under the 1978 PSD regulations. A terminal which would not be subject to review under the 1978 regulations if ship emissions are not included in the determination of potential to emit can also be excluded from review under the new regulations provided certain conditions are met. These conditions are that the owner or operator of such a source has obtained each of the permits required under the SIP for the terminal before the date this notice appears in the Federal Register and commences construction on it within 18 months after that date.

The final definition of the component terms of "stationary

source" differs from the proposed definition in one significant respect. The proposed definition used the phrase "*any grouping of* pollutant-emitting activities." The final definition uses the phrase "*all of the* pollutant-emitting activities." Taken literally, the proposed definition would have referred not only to all of the activities at a plant, but also to any subgroup of those activities. EPA, however, intended it to refer only to all of the activities. The final definition merely makes that explicit.

C. Nonattainment: Comments on Proposal and Response

Many commenters objected to EPA's proposed definition of "source" for nonattainment areas. Several commenters argued that there was no statutory basis for the distinction drawn in the proposal between "complete" and "incomplete" SIPs. Most of the commenters further claimed that the "dual definition" (*i.e.*, treating a source as both a plant and an individual piece of process equipment at the plant) both was illegal under the statute and *Alabama Power* and was wrong as a matter of policy.

The legal arguments presented by the commenters fell into two broad categories. First, they argued that the dual definition really defined "source" as a combination of sources, which had been forbidden by both *Alabama Power* and *ASARCO*. EPA therefore could, in these commenters' view, define "source" as either the entire plant or an individual piece of process equipment, but not both. These commenters opted for the former approach.

The second legal argument challenged EPA's contention that use of the plant-wide definition would be improper in nonattainment areas, because the purpose of the nonattainment new source review program is to reduce emissions, not to hold emissions constant. The commenters claimed that the Act gives primary responsibility for assuring reasonable further progress to the states, and the states therefore can choose whatever mix of strategies they want to achieve reasonable further progress. This suggested to the commen-

ters that EPA had no authority to ban a plant-wide definition for new source review if the state could otherwise demonstrate reasonable further progress.

Several commenters also pointed to a variety of policy concerns which they felt militated against EPA's proposed dual definition. First, they argued that the definition would discourage technological innovation that could actually reduce emissions, because sources would be reluctant to modernize for fear that such requirements as LAER would be applied to them. In particular, they felt sources would be unwilling to retire old inefficient facilities and replace them with efficient cleaner ones. Second, some commenters claimed that there was no point to reviewing a facility where offsetting emissions could be obtained, since on the whole ambient air quality would not get any worse. Finally, many commenters complained that the definitional structure as a whole was far too complex, and they urged that EPA simplify the system both by eliminating the distinction between "complete" and "incomplete" SIPs and by adopting one definition for both PSD and nonattainment areas. Most commenters preferred the PSD definition, although some urged that the dual definition be used.

In revising the Offset Ruling in January 1979, EPA adopted definitions of "source" and "modification" which had the effect of requiring any increase greater than 100 tons in the potential to emit of a plant to undergo nonattainment new source review, even if offsetting reductions at the plant were to accompany the change. The effect of the proposed definitions of "source" and "modification" which are being promulgated today would be basically the same as those in the Offset Ruling. Adoption of the proposed definitions would constitute, therefore, a continuation of an established approach to nonattainment new source review.

The comments on the dual definition have failed to persuade EPA that it should abandon the established approach at this time. As a result, the agency has decided to adopt the dual definition in each set of nonattainment regulations. For the reasons given below, EPA does not agree that the dual

definition is either illegal or unsound from a policy standpoint. In addition, the agency has decided that the dual definition should be used regardless of whether the SIP is complete or incomplete. EPA agrees with the commenters that there is little support in the statute for defining "source" according to the complete or incomplete status of the SIP, and that the proposed definition was complicated.

The dual definition, by defining individual units as a "source," will bring more units in for review in areas with unhealthy air and thereby result in reducing emissions from the status quo. The legislative history of the Act indicates that new source review was intended to be an important tool in the drive towards attainment of ambient air quality standards. As the House Report stated:

> [M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the requirement for reasonable further progress and the indications that emissions from many existing sources in nonattainment areas will be increasing (due to fuel switching, natural gas curtailments) or remaining static (due to delayed compliance orders, et cetera). Finally, the technology forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas. For all these reasons, the committee adopted the requirement for proposed new or modified major stationary sources in nonattainment areas to meet the lowest achievable emission rate requirement.

H. Rep. No. 95-294. 95th Congress, 1st Sess. 215 (1977). In addition, after hearing testimony that no steel sources owned by five major steel companies were in compliance, the House inserted into section 173 a requirement that the owner of a proposed source or modification demonstrate that all other sources owned, operated, or controlled by him in the state are in compliance with the applicable SIP. *Id.* at 210–213. In this way, Congress meant to use new source review as a means of cleaning up *existing* sources as well.

To realize this goal fully, Congress intended that new source review be applied to the greatest extent possible. For example, Senator Muskie, in presenting the Clean Air Act

Amendments of 1977 to the Senate, spoke of reviewing "any physical change which increases [emissions] * * *," and he went on to note:

> Thus, [under the offset ruling and Part D NSR requirements] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a new reduction from previous emission levels. 123 Cong. Rec. at S 13702 (daily edition, August 4, 1977).

Since the dual definition would bring in more sources or modifications for review than would the plant-wide definition used for PSD purposes (including many replacement facilities which would not be reviewed under a plant-wide definition), use of the dual definition clearly is more consistent with Congressional intent.

The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of "source" so as best to effectuate the purposes of the statute. Different definitions of "source" can therefore be used for different sections of the statute. *See* 13 ERC at 2039. As EPA discussed in detail in its proposal, the purpose of the nonattainment provisions is to "positively reduce emissions," not merely to hold emissions constant. In addition, unrestricted use of meeting emissions at an entire plant in nonattainment areas would make attainment more difficult, since many of the limited number of cost-effective opportunities to reduce emissions will in fact be used to avoid review. *See* 44 FR 51932. The dual definition therefore comports with the purposes of Part D of the Act.

Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. In *ASARCO*, the Court of Appeals for the District of Columbia Circuit struck down the definition of "source" for new source performance standards (NSPS), which had employed a "bubble" concept. An impor-

tant element in the court's decision was its belief that the "bubble," by allowing sources to escape NSPS, was inconsistent with the purpose of NSPS, which was to improve air quality. *See* 578 F.2d at 327-28. But in *Alabama Power*, the same court held that for PSD purposes, EPA must use a "bubble" approach, precisely because PSD is designed to maintain air quality and therefore deals with "a significantly different regulation and statutory purpose." 13 ERC at 2044.

Under this analysis, use of a plant-wide definition to avoid new source review would appear to be inappropriate in nonattainment areas, since the purpose of nonattainment SIPs is to improve existing air quality so as to attain the ambient air quality standards. EPA therefore believes that it would be more consistent with the purposes of the Act not to permit states to choose a plant-wide definition of source.

Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define "source" as a combination of sources. EPA had broad discretion to define "building," "structure," "facility," and "installation" so as to best accomplish the purposes of the Act. 13 ERC at 2039. This holding contemplates that one term (such as "building") may be more inclusive than another term (such as "installation"), and so a "building" may include many "installations." In this way, a "source" can, under *Alabama Power*, be composed of smaller "sources," yet not be a combination of sources. The dual definition fits into *Alabama Power*, since under EPA's definitional scheme, a "source" is either an individual piece of process equipment or the entire plant; it is not a combination of sources. That is, when deciding whether a source must undergo new source review, the reviewing authority must determine whether there was a significant increase in emissions at either a "major" individual piece of equipment or at the plant as a whole. Wherever such an increase occurs is a "source." Thus the plant itself is a source, not a combination of sources, although it may contain smaller sources.

EPA recognizes that use of different definitions for PSD

and nonattainment areas adds to the complexity of the permitting process. But this additional complexity is outweighed by the need for a more inclusive definition of source in nonattainment areas in order to assure attainment of standards.

Although it is claimed that some sources may not be willing to modernize their facilities due to the perceived added expense of LAER and the need to demonstrate statewide compliance, EPA believes that its approach is justified by the fact that the dual definition will bring in more sources and modifications for review and will require better pollution control technology in nonattainment areas.[10]

EPA disagrees that use of a plant-wide definition would allow a plant with a new installation to achieve the same emissions reductions as LAER, but in a less expensive manner by finding offsets elsewhere in the plant. This argument assumes that LAER is markedly more costly than the requirements that would otherwise apply. EPA believes that its own past actions, and those of the states, indicate that LAER need not and is not generally being interpreted in this manner.

EPA believes, and most commenters agreed, that new facilities should install state-of-the-art control technology. Such a requirement is imposed by the Clean Air Act for major new sources in PSD areas (BACT), for major new sources in nonattainment areas (LAER), and whenever EPA has set new source performance standards (NSPS). EPA therefore intends to interpret the LAER requirement in a reasonable manner, as it believes it has in the past, and to take a close look whenever LAER would be substantially stricter than these other requirements.

EPA intends that its interpretation of "building, structure,

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[10] Contrary to one commenter's argument, EPA believes that the dual definition will not cause sources to locate in clean areas. Any such source would be subject to PSD review in any event.

and facility" be identical to that for "building, structure, facility or installation" used for PSD purposes.[11]

* * *

Emission Offset Interpretative Ruling

3. Sections I, II, III and IV of the Emission Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979) and 45 FR 31307 (May 13, 1980), are amended as follows:

A. By adding a new third paragraph to Section I, to read as follows:

I. Introduction

* * * * *

The requirement of this Ruling shall not apply to any major stationary source or major modification that was not subject to the Ruling as in effect on January 16, 1979, if the owner or operator:

A. Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

B. Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

C. Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

B. By revising Section II, subsection A, to read as follows:

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[11] One commenter requested EPA define "source as one emitting the criteria pollutants, and not "any pollutant regulated under the Act," EPA has decided to retain its definition, since it comports with section 302(j) of the Act. However, pursuant to section 172(b)(6) EPA will require new source review permits only for those pollutants for which an area has been designated nonattainment and for which the source is major.

II. Initial Screening Analyses and Determination of Applicable Requirements.

A. *Definitions*—For the purposes of this Ruling:

1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

2. "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement, (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

3. "Installation" means an identifiable piece of process equipment.

* * *

9. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this Ruling. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

* * *

State Plans For New Source Review For Nonattainment Purposes.

4. Section 40 CFR 51.18(j) is amended to read as follows:

§ 51.18 Review of new stationary sources modifications.

* * * * *

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(iii) "Installation" means an identifiable piece of process equipment.

* * * *

(ix) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account

in assessing whether a new source performance standard is applicable to such stationary source.

* * *

Restrictions on Construction For Nonattainment Areas

5.40 CFR 52.25 is amended by adding new paragraphs (f), (g), (h) and (i) to read as follows:

§ 52.24 Statutory restriction on new stationary sources.

* * * * *

(f) The following definitions shall apply under this section.

(1) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(2) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e, which have the same two-digit code) as described in the following document, *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(3) "Installation" means an identifiable piece of process equipment.

* * *

(9) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection.

5. **Proposed Rulemaking to Amend Definition of "Source" and to Delete "Reconstruction" Rule in EPA's Nonattainment Area Regulations, 46 Fed. Reg. 16280 (March 12, 1981)**

40 CFR Parts 51 and 52

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans
AGENCY: Environmental Protection Agency.
ACTION: Proposed rules.
SUMMARY: EPA regulations published on August 7, 1980 (45 FR 52676) adopted a different definition of "source" for the PSD rules (which require review of new or modified major sources in clean air areas) than for the nonattainment area new source review rules (which govern review of new or modified major sources in area where air quality does not meet Federal standards). Under the PSD rules a source is, in essence, an entire plant. Under the current nonattainment area rules a source is *either* an entire plant *or* an individual piece of process equipment within the plant. EPA is now proposing to conform the nonattainment area definition of source to that contained in the PSD rules by changing the nonattainment area definition to source to be an entire plant only. The practical significance of this change will be to reduce the coverage of nonattainment area new source review. The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Act (which prohibits major new construction in nonattainment area lacking EPA-approved State Implementation Plans), which will similarly shrink the coverage of the moratorium. In addition, EPA proposes to drop its current requirement that "reconstructions" be subject to nonattainment area new source review.
DATES: The deadline for submitting comments is April 13, 1981.
ADDRESS: Comments should be addressed to Michael Trutna, Standards Implementation Branch (MD-15), Office of Air

Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919-541-5292.

FOR FURTHER INFORMATION CONTACT: Michael Trutna (919-541-5292) or Eric Smith (202-755-0788).

SUPPLEMENTARY INFORMATION: On August 7, 1980 EPA published amended rules affecting PSD new source review, nonattainment area new source review and the construction moratorium. 45 FR 52676. The Prevention of Significant Air Quality Deterioration (PSD) program requires new or modified "major"[1] air pollution sources locating in areas where national ambient air quality standards (NAAQS) are being attained (or where air quality data is insufficient to determine whether or not NAAQS are being attained) to obtain construction permits which meet the requirements of Part C of Title I of the Clean Air Act. The basic purpose of the PSD program is to protect air quality in clean air areas. In areas where NAAQS are not being attained new or modified "major"[2] sources which would emit the pollutant(s) for which the area is nonattainment must obtain construction permits under Section 173 of the Act. In addition, where a nonattainment area lacks an EPA-approved State Implementation Plan (SIP) that meets the requirements of Part D of Title I of the Act, new or modified major sources that would emit the nonattainment pollutant(s) may not construct at all. This "construction moratorium" is required by Section 110(a)(2)(I)

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[1] "Major" sources for PSD purposes are those which emit more than either 100 tons per year or 250 tons per year (depending on the type of source) of any pollutant. See Section 169(1) of the Act. 40 CFR 51.24(b)(1), 52.21(b)(1).

Each new "major" source must get a permit. In addition, any modification to a major source that causes a "significant" increase in emissions must get a permit. "Significant" increases in emissions are specified at 40 CFR 51.24(b)(23)(i), 52.21(b)(23)(i).

[2] "Major" sources for nonattainment purposes are those which emit more than 100 tons per year. 40 CFR 51.18(j)(v).

The "modification" test for nonattainment areas is the same as for PSD. See 40 CFR 51.18(j)(1)(xii).

of the Act. See 40 CFR 52.24. The definitions in EPA's regulations governing the applicability of the construction moratorium are the same as those used in the nonattainment new source review rules 40 CFR 52.24(f).

EPA's amended rules define "source" differently for PSD and nonattainment purposes. The difference revolves around the treatment of a plant that contains a number of individual pieces of process equipment that themselves each emit more than 100 tons per year. For PSD, EPA generally defines "source" in terms of an entire plant. For the nonattainment program, however. EPA defines "source" as both the entire plant and each of those "major" pieces of process equipment within it.

An example will show how these different definitions work. Suppose that a plant has three pieces of process equipment each of which has a potential to emit about 400 tons per year. The owners of the plant decide to expand operations at one piece of equipment resulting in an increase of 70 tons per year of a criteria pollutant,[3] and they further intend to curtail operations at another piece of equipment so as to reduce emissions of the same pollutant by 70 tons per year. If the plant were subject to PSD requirements, these changes would not "modify" any "source". The plant as a whole is the source, and since the reduction at the second piece of equipment balances the increase at the first, there is no significant plant-wide increase in emissions. As noted earlier, a change at a source is not a modification subject to review unless it results in a significant overall increase in emissions. Thus, no permit would be needed. But if the plant were located in an area which is nonattainment for the pollutant involved, then each piece of process equipment is independently viewed as a source and the change at the first piece of equipment would have to undergo preconstruction review, because the piece of equipment is *itself* a major source and there is a significant

[3] A criteria pollutant is one for which EPA has established a NAAQS.

net increase in emissions at that source. Compensating reductions obtained elsewhere at the plant could not be used to escape review, because these reductions did not occur at the same "source."

There would be similar potential for differing results if the plant added a new piece of equipment with a potential to emit 300 tons per year. For PSD purposes, the relevant "source" is the plant, so that if the plant reduced emissions by 300 tons per year at the existing equipment, there would be no net increase at the source. But for nonattainment purposes, the new piece of equipment is itself a major source and so would be subject to review (or the construction moratorium) even if there had been no significant increase in emission from the plant as a whole.

These different definitions of source mean that more new construction projects are subject to review in nonattainment areas (or, if there is no EPA-approved Part D SIP, more new construction projects are subject to the construction moratorium) than in areas subject to PSD requirements.

EPA also requires new source review in nonattainment areas based on a capital investment test of "reconstruction". Specifically, whenever a company rebuilds a "source" so that more than 50% of the capital in it represents new investment, EPA will require new source review no matter how emissions are affected.

The Proposed Amendment

EPA today is proposing to change the definition of "source" contained in the rules governing nonattainment area new source review and the construction moratorium so as to make that definition conform to that contained in the PSD rules. The result will be to eliminate the differences in coverage between the PSD and nonattainment programs that were described above. The change is being carried out by amending the definition of the terms "building", "structure", "facility" and "installation", which are the components of the term "source." EPA is also proposing to delete the definition of "reconstruction."

Discussion

The decision to reconsider the scope of nonattainment area new source review has been made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress. EPA has also reevaluated all of the arguments on all sides of these definitional issues. The Agency has concluded that the amendments to the August 7 rules being proposed today will substantially reduce the burdens imposed on the regulated community without significantly interfering with timely achievement of the goals in the Clean Air Act.

The issue of the proper scope of the nonattainment area definition of "source" is not a clear-cut legal question. The statute does not provide an explicit answer, nor is the issue squarely addressed in the legislative history. The D.C. Circuit (in *Alabama Power Co.* v. *Costle*) has stated by implication that EPA has substantial discretion to define the constituent elements of this term.

The question thus involves a judgment as to how to best carry out the Act. Two issues have been reexamined here. The first is whether the definition of "source" in nonattainment areas should be modified to conform to the one in PSD areas. The second is whether new source review based on "reconstruction" should be required at all.[4]

EPA believes for the following reasons that the proposed changes in the definition of "source" is appropriate.

1. The August 7 definition forbids *any* construction or modification of major pieces of process equipment in areas where the construction moratorium is in effect, even where no increase in emissions at a plant would result. There are a substantial number of such nonattainment areas nationwide at present.

2. Even outside of these "construction moratorium" areas under the present regulatory scheme the August 7 definition

[4] Of course, States always retain the right to choose to impose more stringent new source requirements than Federal rules mandate.

can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities.

3. For both these reasons, under the current overall regulatory system, the August 7 definition can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones.

4. The proposed definition would simplify EPA's rules by using the same definition of "source" for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency.

5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required.

For these reasons EPA has reconsidered the concerns it expressed in the August 7 preamble (See 45 FR 52697-8) and has decided that the "dual definition" is excessively and unnecessarily burdensome.

In light of the change to the nonattainment area definition of source, there is good reason to abandon the "reconstruction" test for nonattainment area new source review. That test by itself only requires review in cases where there is reconstruction, but a "significant" increase in emissions is

absent. With a plant-wide definition of source, the reconstruction provision would only trigger review in cases of plant-wide reconstruction. Few instances of plant-wide reconstruction are expected. Thus, there is little justification for the added complexity this provision entails. Moreover, this change will further reduce inconsistency with the PSD rules which do not have a reconstruction provision.

The Clean Air Act, in Section 111, recognizes an independent, long-term interest in making sure that new facilities install state-of-the-art pollution controls when they are built. This results in the most cost-effective long-term air quality improvement by controlling pollution at the design stage, rather than requiring costly retrofits. Of course, this approach, unlike the nonattainment area requirements of Part D, is not based on the location of particular sources.

For these reasons, EPA believes that a "reconstruction" definition is appropriate for the new source performance standards under Section 111. However, the arguments for it are considerably weaker where a program of review basically designed to meet air quality standards in particular places is at issue and EPA proposes to drop it there.

EPA solicits comments on the proposed rule. All such comments will be carefully considered prior to any final action.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that the attached proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposal will reduce regulatory burdens since fewer sources will be subject to new source review and the construction moratorium.

The Director of the Office of Management and Budget, acting under Section 8(b) of Executive Order 12291, has granted this proposal an exemption from the provisions of that order because of its burden-relieving and deregulatory nature.

This Notice of Proposed Rulemaking is issued under Section 301 of the Clean Air Act, 42 U.S.C. Sec. 7601.

Dated: March 6, 1981.

Walter C. Barber, Jr.,
Acting Administrator.

1. Section II. Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), and 45 FR 52741 (August 7, 1980) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly, and

c. By removing paragraph 9 and renumbering the succeeding paragraphs accordingly.

§ 51.18 [Amended]

2. Section 40 CFR 51.18(j)(1) is proposed to be amended as follows:

a. By changing the words "Building, structure of facility" at the beginning of subparagraph (ii) to read "Building, structure, facility or installation";

b. By removing subparagraph (iii) and renumbering the succeeding subparagraphs accordingly, and

c. By removing subparagraph (ix) and renumbering the succeeding subparagraphs accordingly.

§ 52.24 [Amended]

3. Section 40 CFR 52.24(f) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of subparagraph (2) to read "Building, structure, facility or installation";

b. By removing subparagraph (3) and renumbering the succeeding subparagraphs accordingly, and

c. By removing subparagraph (9) and renumbering the succeeding subparagraphs accordingly.

[FR Doc. 81-7764 Filed 3-11-81; 8:45 a.m.]

6. Final Rule Amending Definition of "Source" and Deleting "Reconstruction" Rule in EPA's Nonattainment Area Regulations, 46 Fed. Reg. 50766 (October 14, 1981)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL 1919–3]

Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On August 7, 1980 (45 FR 52676), EPA promulgated rules for review of major new sources and major modifications in areas where air quality does not meet federal standards (nonattainment areas). Those rules defined "source" in essence as *either* an entire plant *or* an individual piece of process equipment within the plant. On March 12, 1981 (46 FR 16280), EPA proposed to change the definition of source to be an entire plant only. That proposal is being promulgated as a final rule today. The practical significance of this change will be to reduce the coverage of nonattainment area new source review (NSR). The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Clean Air Act (which prohibits major new construction in nonattainment areas lacking a State Implementation Plan (SIP) approved by EPA under Part D of the Act). This change will similarly shrink the coverage of the moratorium.

EPA's August 7 rules also required reconstructed facilities to undergo nonattainment area NSR. As was proposed on March 12, EPA is also deleting that requirement today. These changes will allow states to reduce the regulatory burden of new source review programs without impeding timely attainment and maintenance of air quality standards.

DATES: This rule is effective on October 14, 1981.

FOR FURTHER INFORMATION CONTACT: Kirt Cox. Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711. 919-541-5592.

SUPPLEMENTARY INFORMATION:

1. Background

A. Definition of Source

Under the Clean Air Act, all major new stationary sources and modifications to existing major sources must obtain a permit before they may construct—a Prevention of Significant Deterioration (PSD) permit if the source or modification locates in an area which is cleaner than a national ambient air quality standard (NAAQS), or a nonattainment permit if the source or modification locates in a nonattainment area. The Act defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3).[1]

In *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit held that EPA has discretion to define the constituent terms of the definition of "source" (*i.e.*, the terms "building," "structure," "facility," and "installation") so as to meet the purposes of the various NSR programs mandated by the Act. On August 7, 1980, EPA promulgated amended rules affecting PSD NSR, nonattainment NSR, and the construction moratorium to take into account the court's holding. 45 FR 52676 (August 7 rules). For PSD purposes, EPA defined "source" in essence as an entire plant (the "plantwide" definition). But for nonattainment purposes, EPA

[1] Where a state does not have an approved plan in place for cleaning up a nonattainment area, the Act imposes a moratorium on construction of major new sources and modifications in that nonattainment area (construction moratorium).

defined "source" as both the entire plant and each piece of process equipment at the plant (the "dual" definition).[2]

The practical significance of these different definitions largely lies in the number of modifications each definition would bring in for review. EPA's August 7 rules define a "modification" as a significant net increase in emissions at a source. *See, e.g.*, 45 FR 52747. Since the PSD definition defines "source" in essence as a plant, only net increases occurring at the entire plant need a PSD permit. For example, if a plant increased emissions at one piece of process equipment, but reduced emissions by the same amount at another piece of process equipment at the plant, then there would be no net increase in emissions at the plant, and therefore no modification to the "source." But under the nonattainment definition, the piece of process equipment itself is a "source," which means that only equivalent reductions at that particular piece of process equipment would enable the source to avoid the need for a nonattainment permit. As a result, the nonattainment definition affords fewer opportunities for a source to use a reduction in emissions to compensate for an increase at the source, and therefore avoid the need for a permit.

EPA promulgated a plantwide definition for the PSD program pursuant to *Alabama Power*. *See* 636 F.2d at 397; 45 FR 52695, 52730, 52736 (August 7, 1980). But EPA adopted the more inclusive dual definition for nonattainment areas in order to most effectively use NSR to aid in the cleanup of nonattainment areas. *See* 45 FR 52697 (August 7, 1980). EPA asserted that a narrow definition of source brings in more sources for review, which will enable states to ensure more reductions in emissions through new source permitting. These additional reductions from permitting were said to arise from

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[2] Formally, for PSD purposes, EPA defined each of the terms "building," "structure," "facility," and "installation" as an entire plant. However, for nonattainment purposes. EPA defined "Building, structure or facility" as an entire plant and "installation" as a piece of process equipment.

the greater applicability of the provision in Section 173(1)(A) of the Act (which was adopted by most states) that a new source or modification must obtain offsetting reductions in emissions which are greater than the increase from the new source or modification. EPA further noted that the permit requirement also brings into play Section 173(3) of the Act, under which the owner of a proposed new source of modification must certify that all other sources owned, operated, or controlled by him are in compliance with the applicable State Implementation Plan. Finally, EPA felt that increased applicability of the construction moratorium through use of a narrow definition of source would serve as a strong incentive for states to develop plans to clean up their nonattainment areas.

However, on March 12, 1981, EPA proposed to delete the dual definition for nonattainment areas and to substitute a plantwide definition identical to that of the PSD program. 46 FR 16280. EPA stated that it could, by adopting a plantwide definition, reduce these regulatory burdens and complexities associated with NSR and the construction moratorium without interfering with timely attainment of the NAAQS in accordance with the Act. In particular, EPA argued that by bringing in more sources for review or subjecting them to the construction moratorium, the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air. In addition, EPA noted that a source would still be subject to any applicable new source performance standards (NSPS) and that significant net increases at a plant as well as wholly new plants, still would undergo nonattainment review. Third, EPA stated that its proposal would simplify the regulatory process by adopting the same definitions for PSD and nonattainment permits. Finally, EPA stated that even if a state adopted a plantwide definition, it nonetheless had to demonstrate attainment of the NAAQS and reasonable further progress (RFP) towards attainment by the statutory deadlines. For these reasons, EPA concluded that the dual

definition was unnecessarily burdensome, and so should be deleted.

B. Reconstruction

EPA's August 7 rules also required reconstructed or replacement facilities to undergo NSR in nonattainment areas as if they were new sources. Specifically, the rules provided that whenever a company rebuilt a "source" so that more than 50 percent of its capital cost represented new investment, that rebuilt source had to obtain a nonattainment permit. EPA did not adopt a similar provision for PSD, because few if any whole plants are likely to be rebuilt.

On March 12, 1981, EPA proposed to delete this requirement. EPA stated that since it was proposing to use a plantwide definition for nonattainment areas, and since few entire plants are likely to be rebuilt, there is little need for review of reconstructions. In addition, this change would further reduce the differences between PSD and nonattainment NSR.

II. Today's Action

A. Definition of Source

EPA has decided to adopt the plantwide definition of source and to delete the reconstruction requirement as it proposed last March. After evaluation of the comments received, EPA has concluded that two concerns warrant this approach to NSR.

First, today's action means that both the PSD and nonattainment programs will use the same definition of "source." This alone will reduce regulatory complexity. Sources will no longer have to figure out what an "installation" is, which should lessen any confusion engendered by EPA's August 7 rules.

Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution

control. Sections 101(a)(3), 101(b). It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. *See, e.g.*, Sen. Rep. 95–127 at pp. 10–11; *cf. NRDC* v. *Train*, 421 U.S. 60 (1975). Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations. Since demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D.

This rulemaking in no way affects either the current status of any EPA-approved SIP or the state's duty to assure RFP and attainment of the NAAQS by the statutory deadlines. All state plans containing the dual definition and the reconstruction provisions remain fully valid after this rulemaking. States may, however, choose to adopt a plantwide definition, provided that they submit that change to EPA as a SIP revision.

States choosing to delete the dual definition must demonstrate that their plans, as revised, continue to demonstrate RFP and attainment. Many state plans are based in part upon a projection of reductions in emissions obtained through the state's NSR program. This projection in turn rested upon an anticipated number of permit applications. Use of a plantwide definition would mean that many sources will no longer need a permit. Unless counterbalanced by other consequences of the deletion (*e.g.*, more rapid construction of new clean emission units), this may result in the loss of reductions originally expected by the state. In other instances, where RFP demonstrations were more general in nature, states relied on the NSR program to assist in their enforcement efforts and to identify additional more efficient means to control emissions. In either case, a state's RFP demonstration, which was predicated on those assumptions for NSR coverage, might no longer apply; and the state might have to obtain or guarantee those reductions in other ways (such

as requiring additional reductions from existing sources and stepping up enforcement efforts). States changing from a dual to a plantwide definition must therefore reassess their general attainment strategies and revise them as necessary to ensure RFP and attainment by the statutory deadlines.

A related problem may arise if a state decides to rescind existing nonattainment permits. A modification which required a permit under the dual definition may not have needed one had the plantwide definition been in effect, and some states may choose to rescind those permits and reissue them with conditions more favorable to the affected sources (such as deleting the requirement that the source install the technology assuring the lowest achievable emission rate (LAER)). However, the emissions reductions required by that permit may have been included in the state's RFP demonstration, and rescission might therefore damage that demonstration. States should thus be careful that, in designing any rescission procedure, they do not interfere with RFP and attainment. Any such rescission procedure must be submitted to EPA as a SIP revision and must assure that each rescission is consistent with the state's RFP demonstration.[3]

B. Reconstruction

EPA is also taking a final action today to delete the requirement that reconstructed facilities (as that term is defined in the rules) be subject to nonattainment requirements. The rationale for that decision is the one offered in the proposal: Adoption of the plantwide definition means that the reconstruction requirement applies only to entire plants which are rebuilt. Since few if any such reconstructions are anticipated, there is little reason to retain this requirement. In addition, deletion of the requirement makes the PSD and nonattainment rules the same in this respect.

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[3] Permit rescissions granted under an EPA-approved permit rescission procedure would not have to be submitted to EPA as a SIP revision.

As with the dual definition, some state plans may be based upon emission reductions obtained from the reconstruction provision. States choosing to delete this requirement should therefore assess and adjust their RFP and attainment demonstrations as necessary.

III. Response to Comments

EPA received 81 comments in response to its March 12 proposal, the majority of which favored deletion of the dual definition and the reconstruction requirement. The particular comments, as well as EPA's response, are discussed below.

A. Modernization

Many commenters who agreed with the proposal stated that it would be conducive to modernization of existing plants and so would enhance economic efficiency. These commenters also agreed that the dual definition acted as a disincentive to replacement of outmoded dirty facilities with newer cleaner ones, and some cited specific examples where this in fact has happened. Other commenters, however, noted that EPA had cited no data to corroborate its claim that the dual definition impeded modernization, and argued, also without supporting data, that the direct cost of offsets and of the installation (pursuant to Section 173(2)) of technology resulting in LAER was so much less than the total cost of a modified plant that it did not act as a disincentive.

EPA believes that the examples provided by the commenters support its statement in the proposal that the dual definition impedes legitimate efforts to modernize existing plants. (*See e.g.*, comments of Crown Zellerbach: Union Oil Corporation.) This is particularly true in areas subject to the construction moratorium, where plants cannot modernize a particular facility, even if emissions at the plant as a whole actually *decrease*. To deny construction to candidate modernization projects which would cause no significant increase in air pollution at the plant, and which in some cases would produce a net air quality improvement, may call upon such

projects to bear an unacceptably large part of the overall burden for cleaning up a nonattainment area. Accordingly, EPA has concluded that elimination of the dual definition requirement will remove a barrier to modernization of the nation's industrial base.

A related issue raised by some commenters was that deletion of the dual definition would actually result in more economic inefficiency in the nonattainment area as a whole. The argument here rests on two claims. First, installation of technology representing LAER means the new source will have lower emissions and thus need fewer offsets: sources not installing LAER would need more offsetting reductions to avoid the need for a permit. Deletion of the dual definition therefore would mean that more cost-effective reductions would be used up quickly, leaving fewer reductions available over the long term. This would make it more difficult for new sources to find needed offsets and so could actually impede growth over time; and if additional reductions were needed to attain the NAAQS, they could only be obtained by imposing additional controls on existing sources, controls which would require costly retrofits. Second, the proposal was alleged to favor large existing sources over new sources, because many existing sources have significant amounts of available emission reductions that can be used to avoid the need for a permit, whereas new sources would always have to undergo nonattainment area NSR. This means that existing sources might use up all the available reductions, and so preclude all new construction.

The concerns raised by these commenters are at this point speculative, particularly in view of the fact that the commenters provided no data to support their claims. In addition, they contradict a central principle of economic efficiency, under which the cheapest and most cost-effective emission reductions should be allowed to be used first, not saved until some hypothetical future need develops while more expensive controls are used first. More importantly, given the structure of the Act, EPA believes that the choice of whether to take the risks these commenters mention is one properly made by

the states, not the federal government. If a state feels that the long-term risks of the plantwide definition outweigh its potential short-term benefits, then that state may properly retain the dual definition. But this kind of decision is essentially based on economic factors, not air quality concerns, and so is appropriately left to the states. *cf. Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

B. Regulatory Complexity

Supporters of the proposal endorsed it as a means of simplifying the regulations, thereby reducing some of the confusion in the permit review process and eliminating an inconsistency with the PSD program. Other commenters asserted that the dual definition adds only slightly to the complexity of the regulations and that anyone who carefully reviews the regulations can readily understand the way in which the definition works.

EPA believes that elimination of the dual definition clearly simplifies what any objective observer would agree is a quite complex regulation. First, plants sometimes must get a PSD permit for one pollutant and a nonattainment permit for another pollutant. Using the same definition for PSD and nonattainment purposes simplifies the permit process. Second, by defining "source" in essence as an entire plant, EPA has eliminated the problem of determining what an "installation" is in a given situation.

C. Application of Control Technology

Many commenters agreed that adequate use of the most up-to-date control technology is assured, regardless of the applicability of nonattainment area NSR, because NSPS will continue to apply to many new or modified facilities. Other commenters argued, however, that there is no applicable NSPS for many categories of sources, and that NSPS is often not as stringent as LAER. These commenters also claimed that Congress intended that all new sources must install some form of advanced pollution control technology, particularly in

nonattainment areas where the maximum possible emission reductions must be obtained.

EPA has embarked upon an expanded program of NSPS development. *See* 40 CFR 60.16. This program will assure that most major emitting source categories will be covered by an NSPS. Accordingly, EPA believes that eventually the NSPS program will ensure that new and modified sources will adequately apply state-of-the-art control technology. To the extent that the controls imposed are not as strict as LAER, the internal offsets needed to "net out" of NSR will make up the difference.

EPA agrees that in some cases an NSPS will be less stringent than LAER. But this comment is not wholly relevant, for while Congress intended that new or modified *sources* apply LAER, it left EPA discretion to define "source." As noted above, EPA believes that a plantwide definition of "source" is consistent with the purposes of the nonattainment provisions of the Act, and so comports with Congressional intent. Consequently, EPA's approach with regard to application of control equipment is consistent with the Act.

D. Assuring Reasonable Further Progress and Attainment

Many commenters who supported the proposal emphasized that the states will remain subject to the requirement that they demonstrate that each nonattainment area will attain the NAAQS as expeditiously as practicable and will show reasonable further progress toward attainment. These commenters thus agreed with EPA that use of a plantwide definition need not interfere with the fundamental purpose of Part D of the Act (relating to nonattainment areas). Other commenters challenged EPA's analysis, arguing that most RFP analysis, and attainment demonstrations are so imprecise that extensive NSR coverage is essential to assuring attainment and RFP. These commenters claimed that this imprecision is exacerbated by the fact that most Part D SIPs are based on deficient emission inventories. Therefore, the reviewing authority cannot say with confidence that any opportunities for emissions reductions can be ignored. They

added that this also means that even "insignificant" increases in emissions could pose a problem, since states would have difficulty using NSR to offset their cumulative impact.[4] As a result, the commenters felt it was crucial to have a comprehensive NSR system to manage air quality in nonattainment areas and assure tight control of pollution. Therefore, under these commenters' analysis, deletion of the dual definition would remove an essential state tool for clean-up of nonattainment areas. In fact, several commenters argued that EPA's approach as a whole is short-sighted, because it will enable sources to build without any review, despite the fact that such sources might have to install expensive retrofit technology when the state or EPA discovers that the area has not attained the NAAQS.

These comments miss the point. As noted above, and as correctly pointed out by several commenters, state plans *must* assure RFP and attainment by the statutory deadlines. If a state wishes to use a plantwide definition and run the risks identified by these commenters, then that state has discretion to do so, provided that its choice does not interfere with RFP and attainment. EPA believes that it is more appropriate for the states to make any needed decisions in this area, for it is the states that are closest to their own particular situations and problems and so it is the states that are best equipped to make the choices about which the commenters are concerned.[5]

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[4] One commenter erroneously claimed that EPA's rules enabled sources to increase emissions up to 100 tons per year (tpy) without having to undergo review. In fact, EPA has defined as "insignificant" (*i.e.* as below the level requiring review) emission increases which generally range from 25 tpy to to 40 tpy, depending on the pollutant in question. *See e.g.*, 45 FR 52747 (August 7, 1980).

[5] In any event, the commenters can raise these concerns at the state level during state proceedings on whether to adopt to plantwide definition.

E. Impact on State Plans

Some states asked EPA to allow them to choose the definition of source most appropriate to their own program—they were concerned that EPA's proposal would keep them from continuing to use a narrower definition. Other states pointed out that they may have no choice but to use a plantwide definition if EPA were to promulgate one, for these states have laws which prohibit them from developing SIPs which are more stringent than what EPA's rules would require. Finally, one commenter was concerned that a plantwide definition would jeopardize existing NSR rules which require permits for *all* changes at a plant, regardless of whether these changes would increase emissions at the entire plant. These rules were claimed to be necessary to keep track of the activities at different sources in the state and to monitor RFP.

By this rulemaking, EPA does not intend to require any state to change its NSR rules. Similarly, nothing in today's promulgation is meant to forbid states from requiring permits for all changes at a plant. Finally, to the extent that a state has laws which prohibit state rules from being more stringent than federal regulations, EPA recognizes that this may be a problem. States may as a result have to change either their rules or their laws.

F. Construction Moratorium

Some commenters argues that elimination of the dual definition for the construction moratorium will mean that many fewer sources will be subject to the moratorium and so will reduce the incentive for states lacking Park D plans to develop them. However, this comment ignores the fact that the primary purpose of the construction moratorium is to preserve ambient air quality while the states are preparing their plans for cleaning up nonattainment areas. A plantwide definition is consistent with this purpose, since it ensures

that emissions will not increase significantly during this time.[6] In any event, the moratorium will continue to fulfill its secondary purpose as an incentive to state action, since new sources and modifications which result in a significant net increase in emissions will still be prohibited from constructing in nonattainment areas subject to the construction moratorium.

G. Use of Standard Industrial Classification (SIC) Codes

One commenter requested that EPA expand the definition of "source" to include a group of commonly-owned plants on a contiguous property or complex. However, EPA has already considered and rejected this comment. *See* 45 FR 52695 (August 7, 1980). EPA had originally proposed a definition similar to that requested by the commenter, but it decided instead to adopt the present system, based upon SIC codes, since a broader definition would severely strain the boundaries of even the most elastic of the four terms which define the term "source," *i.e.*, "building," "structure," "facility," and "installation." EPA believes that the aggregation of separate contiguous plants under common ownership into one source would be inconsistent with the common sense notion of plant. *See Alabama Power*, 636 F.2d at 397–98.

H. Reconstruction

Most commenters also agreed that EPA should delete the reconstruction test for nonattainment NSR. Others argued that EPA should retain the test, relying basically upon the same claims as those addressed above for the dual definition. For the reasons laid out above, EPA has concluded that the adoption of a plantwide definition means that a reconstruction test no longer is needed.[7]

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[6] At the same time, the present moratorium imposes costs on plants that want to modify internally without lowering emission.

[7] Some commenters urged EPA to delete the reconstruction test from the NSPS rules. That comment is not relevant to this rulemaking, which addresses *only* requirements for new source review in nonattainment areas.

I. Legal Arguments

Many commenters adduced legal arguments to the effect that EPA lacked discretion to define "source" for nonattainment purposes. Some commenters claimed that EPA was legally compelled to adopt a plantwide definition, while others asserted that EPA must as a matter of law use a dual definition. However, in view of the lack of express statutory language and the conflicting Congressional signals found by the various commenters in the legislative history, EPA believes that it has discretion to choose a definition of "source" best suited to the nonattainment program. This authority was expressly noted in *Alabama Power*, where the court held that "EPA had descretion to define (the) statutory terms (for "source") reasonably so as to carry out the expressed purposes of the act." 636 F.2d at 396.

Those commenters who favored the dual definition raised a variety of legal arguments.[8] These claims will be addressed individually.

(1) *A dual definition is required by Alabama Power and by ASARCO v. EPA. 578 F.2d 319 (D.C. Cir. 1978).*

The commenters asserted that the *Alabama Power* and *ASARCO* cases held that where the purpose of a program is to maintain air quality, as in PSD, a plantwide definition is appropriate; but where the purpose is to *improve* air quality, a much narrower definition of "source" must be used. Since the purpose of Part D of the Act is to clean up nonattainment areas, the commenters claimed that EPA must continue to use a dual definition.

The difficulty with this claim is that it ignores the fact that states have the discretion to define the approaches best suited to their own problems and needs, provided that those approaches will demonstrate RFP and attainment. If a state

[8] One commenter requested that EPA insert each state's SIP into the record for this rulemaking. EPA is not granting this request because the SIPs have been incorporated by reference into the Code of Federal Regulations and so are documents of public record.

can demonstrate attainment despite the use of a plantwide definition of source, then EPA must approve the state's plan. Accordingly, use of a plantwide definition can be consistent with the purposes of Part D.

(2) *Use of a plantwide definition means that state plans will not demonstrate attainment as expeditiously as practicable, since fewer sources will be brought in for review.*

This objection ignores the basic point that this is a matter for the states to decide: they are still subject to the statutory requirements, but EPA beleives that they may use a plantwide definition if that will not interfere with their demonstration of attainment.

(3) *The legislative history of the Act requires that as many changes at a "source" as possible be brought in for NSR.*

This begs the question, for the legislative history and, more importantly, the statute, speak of "sources," and EPA has discretion to define what that term means for the purposes of the nonattainment program.

(4) *The definitions of "source" used in the Act themselves mandate a dual definition.*

The commenters noted that the PSD definitional structure uses only the term "facility," while NSPS and nonattainment structures use both "source" and "facility." This difference was a point on which *Alabama Power* relied to distinguish *ASARCO*. Accordingly, the commenters claim that since *ASARCO* applied to NSPS and since the terms are defined identically for NSPS and Part D (see Section 111(a)(3) and 172(b)(6)). EPA must for Part D use at least the narrow definition contained in the NSPS rules.

While it is true that the court in *Alabama Power* used the different definitional structures of NSPS and PSD to distinguish *ASARCO*, the critical element of the court's opinion rests on the fact that EPA may define the term "source" so as to best meet the purposes of a particular program. *See* 636 F.2d at 391–98. As discussed above, EPA believes that a plantwide definition is consistent with the purposes of Part D. Consequently, EPA may define the constituent terms of "source" differently for NSPS and Part D.

(5) *Congress ratified the dual definition.*

The commenters argue that in Section 302(j), Congress used the terms "source" and "facility" in defining the unit to which NSR applies, and it must have known that EPA at that time defined "facility" quite narrowly in terms of particular pieces of process equipment. Congress adopted the entire Offset Ruling in 1977, and therefore ratified the Ruling's use of a dual definition.

The difficulty with this argument is that Congress used "facility" in defining the unit to which PSD review applies. Section 165(a), yet in *Alabama Power*, the court held that EPA had discretion to interpret this term to mean in essence an entire plant. *See* 636 F.2d at 397. Moreover, Congress provided in Section 129(a)(1) of the Clean Air Act Amendments of 1977 that EPA could modify the Offset Ruling "by rule." It therefore contemplated that EPA could make the kind of change to the Ruling being made today.

(6) *Congress definition of LAER implies that it chose the dual definition.*

The commenters claim that LAER is supposed to be applied to a "source," Sections 171(3), 173(2), yet LAER actually is applied to pieces of process equipment. In addition, the LAER definition references any applicable NSPS, and NSPS applies to pieces of process equipment. From this, the commenters infer that Congress intended "source" to be defined at least as a piece of process equipment.

This argument was implicitly rejected by *Alabama Power*. The PSD program requires that "sources" install the Best Available Control Technology (BACT). BACT is also applied to pieces of process equipment, and it also refers to any applicable NSPS. Yet *Alabama Power* authorized EPA to define "source" as in essence plant for PSD purposes. Consequently, the use of the term "source" in the definition of LAER does not necessarily mean that "source" must be defined narrowly for nonattainment purposes.

(7) *EPA's proposal treats reconstructions as modifications, yet the Act requires that they be treated as new sources.*

The commenters assert that Section 173 uses the phrase

"by the time the source is to commence operation," which means Congress was referring only to new sources. Moreover, they argue that when a facility is replaced or rebuilt it is first shut down, which means that there is no "source" to modify. As a result reconstruction must obtain a NSR permit as new source, not modifications.

The language to which the commenters refer applies to *both* new sources and modifications, not soley to new sources as the commenters suggest. *See* Sections 172(b)(6), 173(1)(A). Any other reading of Section 173 would read all modifications out of the Act, which clearly is contrary to the statute. In addition, this argument begs the question, for it assumes that the "source" is a piece of process equipment. Yet the issue is precisely how to define "source," and this is a matter left to EPA's discretion.

(8) *EPA did not provide the factual basis for its proposal, as mandated by Section 307(d)(3)(A) of the Act.*

EPA does not believe that it is required to follow Section 307(d) in this rulemaking. That section only applies to particular types of EPA actions, of which only Section 307(d)(1)(B) is relevant here. That subsection requires Section 307(d) procedures for federal promulgation of a SIP. Here, EPA is modifying regulations codified at 40 CFR Part 51, which are minimum requirements for the content of SIPs, and not promulgation of SIPs themselves. Consequently, these rules clearly are not subject to Section 307(d). The construction moratorium, which is also the subject of today's action, is codified at 40 CFR Part 52, but it is a *generic* rulemaking, not a rulemaking for a particular SIP, and so is not subject to Section 307(d) either.[9]

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[9] It should also be pointed out that the issue of the definition of "source" in nonattainment areas has been before the public for several years. EPA first solicited comments on its definition on January 16, 1979, when it modified the Offset Ruling. *See* 44 FR 3298. Many comments were received at that time. On September 5, 1979, EPA solicited further comments on this issue, when it proposed comprehensive amendments to its PSD and nonattainment

IV. Conclusion

By today's action EPA is modifying the definition of "installation" to mean the same as "building, structure, and facility," and is deleting the definition of "reconstruction" and its supporting definition of "fixed capital cost." These actions apply to the Offset Ruling (codified at 40 CFR Part 51 Appendix S), 40 CFR 51.18(j) (requirements for new source review in nonattainment areas), and 40 CFR 52.24 (the construction moratorium). They will have the effect of defining a "source" for nonattainment purposes as in essence an entire plant, and of treating reconstruction and replacement as a modification to an existing source, rather than as a new source.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this action will not have a significant economic impact upon a substantial number of small entities. These rules will reduce regulatory burdens since fewer sources will be subject to NSR and the construction moratorium. Since the requirements of the Clean Air Act apply to all sources defined as major, EPA did not have the additional flexibility to alter the applicability of these requirements to any small entities that meet the definition of major source.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because it reduces the coverage of monattainment area NSR and the construction moratorium and so lessens regulatory burdens.

This action was submitted to the Office of Management and Budget (OMB) for review as required by the Order. Any comments from OMB to EPA and any EPA response are available for public inspection at the Central Docket Section.

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regulations. *See* 44 FR 51924. Accordingly, even if Section 307(d) were applicable, the commenters have had adequate opportunity to raise their concerns to EPA and have presented no evidence that they were harmed by EPA's failure to follow precisely the procedures set out in the Section.

U.S. Environmental Protection Agency, West Tower, 401 M Street, SW., Washington, D.C. 20460 (Docket A–81–14)

Pursuant to 5 U.S.C. 553(d)(1), this action is being made immediately effective because it relieves a restriction.

The rules being promulgated today are nationally applicable, and this action is based upon a determination of nationwide scope and effect. Under Section 307(b)(1) of the Clean Air Act, judicial review may only be sought in the United States Circuit Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before December 14, 1981.

(Secs. 110(a)(2)(I), 172(b)(6), 173, 301(a) of the Clean Air Act, as amended, (42 U.S.C. 7410(a)(2)(I), 7502(b)(6), 7503, 7601(a); sec. 129(a)(1) of the Clean Air Act Amendments of 1977. Pub. L. No. 95–95. 91 Stat. 685 (August 7, 1977))

Dated: October 3, 1981.

Anne M. Gorsuch.

Administrator.

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Appendix S [Amended]

1. Section II. Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), 45 FR 52741 (August 7, 1980), and 45 FR 59879 (September 11, 1980) is amended as follows:

a. By changing the words "Building; structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly; and

c. By removing paragraphs 9 and 10 and renumbering the succeeding paragraphs accordingly.

§ 51.18 [Amended]

2. Section 40 CFR 51.18(j)(1) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (j)(1)(ii) to read "Building, structure, facility or installation";

b. By removing paragraph (j)(1)(iii) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (j)(1)(ix) and (x) and renumbering the succeeding subparagraphs accordingly.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

§ 52.24 [Amended]

3. Section 40 CFR 52.24 (f) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (f)(2) and to read "Building, Structure, facility or installation";

b. By removing paragraph (f)(3) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (f)(9) and (10) and renumbering the succeeding subparagraphs accordingly.

[FR Doc. 81-29706 Filed 10-13-81; 8:45 am]

C. Designated Comments From Administrative Rulemaking Record:

1. Comments of Louisiana-Pacific Corporation (March 26, 1981)

March 26, 1981

Environmental Protection Agency
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, N.C. 27711

Attn: Mr. Michael Trutna

Dear Mr. Trutna:

We have carefully reviewed the Federal Register, Vol. 46, No. 48, Thursday, March 12, 1981, page 16280 thru 16282.

We are very pleased to see a clear definition of "source" as it pertains to a non-attainment area, as well as dropping the current requirement regarding "reconstruction."

It will, in our case permit the construction of a 330,000 lb. per hour waste fuel boiler complete with electrostatic precipitator and SO_2 scrubber to replace two oil fired boilers with no pollution devices.

It will also permit the construction of a 700 ton/day kraft chemical recovery boiler of the latest "low odor" design replacing two older "direct contact" chemical recovery furnaces.

In addition it will reduce our dependance on buying 200,000 lbs./hr. of steam from oil-fired public utility boiler close by. The total investment of approximately $40,000,000 will greatly reduce the air pollution from the plant ("source") and save 500,000 barrels per year of imported oil.

Not only do we strongly support this change, but see it, hopefully, as a more balanced view of pollution vs. our country's economic well-being.

Sincerely,

M. B. Mountain
General Manager
Container Products Division

2. Comments of Regional Air Pollution Control Agency Serving Clark, Darke, Greene, Miami, Montgomery and Preble Counties (Ohio) (March 27, 1981)

March 27, 1981

Mr. Michael Trutna
Standards Implementation Branch MD-15
OAQPS
Research Triangle Park, N.C. 27711

Dear Michael:

This letter is written in response to the March 12th Federal Register proposed rules concerning the redefinition of "source" for nonattainment areas, and the removal of the "reconstruction" requirements. The Regional Air Pollution Control Agency (RAPCA) wishes to express its support for this action. We feel that the change will provide consistency and will allow more local agency responsibility in the new source review process.

We have for some time felt that our local review of new sources is sufficient to assure new source compatibility with the attainment strategy for the Dayton Area. We will continue to review and permit individual equipment installations under the Ohio EPA permit to install regulation which requires the installation of best available technology on all new sources, regardless of size. Federal review of new source installations in the Dayton Area in past years has proven to be redundant, time consuming, confusing, and often times, many months after the new source has been permitted and installed. To the extent that this proposal removes such redundancy, we are supportive. We have in the past sought assistance from both the regional office and that in RTP for advice on complex sources. We shall continue this practice in the future. We believe strongly that the proper role for the federal EPA in

the new source review process is one of advice and assistance.

Again, we support the proposed changes and thank you for this opportunity to comment.

Sincerely,

John A. Paul/for
William T. Burkhart,
Supervisor
JAP/vmt
cc: Charles Taylor, Chief
OAPC, Ohio EPA

3. Comments of Commonwealth of Pennsylvania Department of Environmental Resources (April 3, 1981)

April 3, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning
and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

This is in response to the proposed revisions to the definition of source as it applies to nonattainment areas which was published on March 12, 1981 (46 FR 16280–16282).

I am concerned that the proposed change may needlessly increase emissions in areas violating the primary National Ambient Air Quality Standards (NAAQS) and jeopardize the ability to these areas to attain the NAAQS. In addition, I am concerned because the proposed change may not be consistent with the statutory requirements of the Clean Air Act.

The air quality needs of areas violating the health related NAAQS are different from those in Prevention of Significant Deterioration (PSD) areas. In nonattainment areas, there is a need to reduce emissions; while, in PSD areas the emphasis is on limiting increases in emissions. Making the nonattainment definition of source identical to that used in PSD areas will make it more difficult to obtain the emission reductions necessary to assure attainment of the NAAQS. The reasons for this are discussed below.

The PSD program definition of "significant" exempts from the new source review increases in emissions up to 40,

25 and 40 tons per year for sulfur dioxide (SO_2), total suspended particulates (TSP) and volatile organic compounds (VOC) sources, respectively. Although these levels of emissions may be "insignificant" in areas attaining standards, this is not the case in many nonattainment areas. In most TSP and VOC nonattainment areas and some eastern SO_2 nonattainment areas, the violations of the NAAQS result from the cumulative impact of all sources in the nonattainment area. Allowing even the PSD significance level increases from new and modified sources would further burden already overburdened atmospheres and require corresponding reductions from existing sources.

Further the proposed redefinition would exempt some sources from the nonattainment area control technology requirements (RACT and LAER) based on the rationale that the New Source Performance Standards (NSPS) would assure use of the most up-to-date pollution control technology. This rationale is flawed because NSPS have not been promulgated for a large number of major air pollution sources (for example, coke ovens, industrial boilers and numerous VOC source categories). Additionally, the proposed redefinition is structured so that the exempt sources would not even be subject to the reasonably available control technology (RACT) requirement of Section 172(b)(2) of the Clean Air Act.

Exempting sources from the control technology requirements and permitting PSD emission increases while attempting to solely rely on the reasonable further progress (RFP) provision (as suggested in the Federal Register) as the measure of success of the Part D plans may be inadequate to assure attainment and short-sighted. The current Part D State Implementation Plan control strategies are based, in many cases, on rudimentary emission—air quality relationships (ozone) and plans for further study of the nonattainment problem (TSP). As a result, there is considerable uncertainty regarding the

adequacy of the amount of emission reductions necessary to achieve the health related standards. This ambiguity makes the Part D RFP plans in many cases tenuous at best. In addition, the RFP demonstrations are an "after-the-fact" evaluation of progress. In most cases, they are based on emission inventories that lag by three years or more. Because of this time lag, numerous new and reconstructed sources may be built with lenient or no control before it is realized that the Part D plans may not be adequate to attain the NAAQS. Ultimately, this may result in the costly retrofitting of better controls on those new and reconstructed sources exempt from the new source review.

In addition to the above requirements, it should be remembered that the National Commission on Air Quality projected that 11 areas of the country were certain to miss the 1987 deadline for attainment of the ozone standard, 18 areas probably would not attain the TSP standard by 1982, and 4 areas are projected not to attain the SO_2 standard by 1982 "because they are relying on unrealistic control measures or . . . improvements in air quality are slower than projected." These failures to meet the health related NAAQS are predicted to occur in some of the largest and most densely populated areas of the country. Relaxing the requirements for new construction in these areas would further jeopardize public health and make it more difficult to attain these standards in the future.

Regarding the statutory requirements of the Clean Air Act, the EPA currently uses a definition of source, as it applies in nonattainment areas, which recognizes that all major new, modified and reconstructed sources (equipment) should be subject to the new source review requirements even if the new emissions are offset by emission reductions from other equipment at the same plant. The proposed redefinition would limit the new source review to only those situations where plantwide emissions increases exceed the PSD significance levels.

Although the Federal Register proposal states that EPA feels it has substantial discretion to redefine source, it appears to me that EPA's discretion as it applies in nonattainment areas is clearly limited. Senator Muskie, during his presentation to the Senate of the Clean Air Act Amendments of 1977, stated that "The conference bill ratifies EPA's 'emission offset' interpretative regulation, published in the December 21, 1976 Federal Register at pages 55524–30" (see 123 Congressional Record, column 1, daily edition, August 4, 1977, statement of Senator Muskie). This clearly links the attainment provision of the Clean Air Act Amendments of 1977 to EPA's definition of source as it existed in 1976. (The definition of source as used in the December 21, 1976 regulation and as subsequently modified refers to identifiable pieces of equipment as well as entire plants.)

Further in his presentation Senator Muskie stated: "Thus, a new source is still subject to such requirements as 'lowest achievement (SIC) emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source . . . is subject to all the nonattainment requirements as a modified source if it makes *any physical change which increase the amount of air pollutant for which the standards in the area are exceeded.*" (emphasis added.) (See 123 Congressional Record 13702, column 2, daily edition, August 4, 1977, statement of Senator Muskie.)

Thus, when the Part D requirements of the Clean Air Act and Senator Muskie's presentation are considered together it clearly indicates the intent of Congress to require that all major new construction in a nonattainment area be subject to the new source review requirements of Section 173 of the Clean Air Act. This effectively limits EPA's discretion on the definition of source.

In addition to these directions on the applicability of the new source requirements to individual pieces of equipment in nonattainment areas, Congress directed that no emission increases be permitted from the construction of new or modified major sources (equipment). Section 173 of the Act provides:

". . . that permits to construct and operate may be issued if—

(1) . . .

(A) . . . emissions in the region . . . will be "*sufficiently less* than total allowable emissions . . . prior to the application . . ." (emphasis added).

This point was also stressed by Senator Muskie during his presentation when he stated that new and modified sources would only be allowed:

". . . when *more-than-offsetting emission reductions* are secured prior to the new facilities startup date . . ." (emphasis added) (Congressional Record 13702).

EPA's proposed redefinition of sources would not be consistent with this provision since it would allow emission increases of 40, 25 and 40 tons per year for SO_2, TSP and VOC sources, respectively.

Another area where the proposed redefinition of source would not be consistent with the statutory requirements of the Clean Air Act is Section 172 which requires the implementation of all reasonably available control measures on existing sources and attainment of the health related standards "as expeditiously as practicable". Since the proposed redefinition of source would eliminate all new source review requirements, there would be no legal basis for imposing the reasonably available control requirements of Sections 172(b)(2) and (3). As a result, new sources eligible for the exemption would be permitted to start operation with little or no controls. Those sources not

eligible would be required to install the most stringent levels of control and existing sources would be required to install RACT levels of control. Certainly Congress did not intend this disparity in these critical air quality areas. Nor did Congress intend that achievement of the health related standards be delayed because new or modified sources were inadequately controlled.

One of EPA's stated purposes in proposing to exempt construction from new source review and RACT requirements is to reduce unnecessary regulatory burdens, thus, creating a better climate for new investment and plant modernization in nonattainment areas. However, because of the potential for legal challenges, EPA proposed action would do the opposite of its intended purpose. Legal challenges would create considerable uncertainty and be a disincentive to new investment and modernization in nonattainment areas. Further, it may result in the need to retrofit controls that would be more costly than if the equipment were originally constructed with the proper controls.

In closing, I would like to reemphasize that it is my belief that the proposed change may jeopardize progress towards attainment of the NAAQS and may not be consistent with the Clean Air Act requirements. Therefore, I strongly encourage the EPA to not pursue a redefinition of source that would allow increases in emissions and exemptions from control technology requirements.

If you have any questions concerning these comments, please contact me.

Sincerely,

JAMES K. HAMBRIGHT,
Director
Bureau of Air Quality Control

4. Comments of New York State Department of Environmental Conservation (April 6, 1981)

April 6, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning & Standards
Research Triangle Park, North Carolina 27711

Dear Mr. Trutna:

The Department of Environmental Conservation supports the redefinition of "source" in nonattainment areas proposed in the Federal Register, Vol. 46, No. 48, pages 16280–16282.

This is the first sign of positive action regarding the Prevention of Significant Deterioration/Emission Offset Policy question in a long time. All the arguments presented in favor of changing the definition of "source" in a nonattainment area to be compatible with the definition in an attainment area are valid. I can think of no arguments in opposition. There will be those who complain that this removes "technology forcing" requirements but this contention is fallacious. The main outcome of requiring individual review of each new piece of equipment at a plant in a nonattainment area was to preclude any modernization. No flexibility was permitted a source owner in selecting options. In many cases, it was simpler and cheaper to operate old, more polluting sources than to trade up. With an unapproved SIP, there were no options.

The previous definition requiring individual review of any new unit would be fine if there were an infinite amount of investment capital available and an incentive for scrapping existing equipment. Since this is not the case, all which was accomplished was to encourage use of outdated equipment

beyond the point where it would have otherwise been replaced by newer, cleaner, more efficient units.

The new definition will have both short- and long-term benefits in terms of air quality.

Sincerely,

Harry H. Hovey, Jr., P.E.
Director
Division of Air

5. Comments of Missouri Department of Natural Resources (April 8, 1981)

April 8, 1981

Mr. Michael Trutna
U.S. Environmental Protection Agency
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

This letter is in response to the solicitation of public comments on the proposed rule published in the Federal Register on March 12, 1981 (46FR16280) pertaining to the revision of the term "source."

The Missouri Air Pollution Control program supports this proposed rule change. We hope there will be other such changes in the near future which will tend to standardize the definitions of various terms as used in the EPA regulations published over the past ten years.

Sincerely,

John W. Haasis
Staff Director
Air Pollution Control Program

JWH:RJC:bw

6. Comments of Crown Zellerbach (April 8, 1981)

April 8, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

We applaud the proposed change in the definition of "source" contained in the rules governing new source review in nonattainment areas so as to make the definition the same for PSD areas (FR Vol. 46, No. 48, page 16280). We believe the change will result in increased industrial capacity with no increase in air pollutants. In fact, some of the projects that we are considering will result in a decrease in nonattainment pollutants that would not have occurred without this rule change.

For example, at the present time it is not possible to add a flexographic printing press without the use of very expensive and energy consuming add-on equipment designed to meet LAER. In many plants, low solvent technology plans have been approved which may take five years to implement. Now it will be possible to reduce emissions from some or all of the presses in the plant to allow the installation of a new press. In general, new equipment is designed to use less solvent than older units. The new press, because of its higher productivity, will be operated at maximum operating hours resulting in a decrease in the total plant emissions.

The elimination of a reconstruction requiring LAER in a nonattainment area will eliminate the possibility that an involuntary reconstruction, due to an accident, could result

in a plant closure if offsets greater than 1.0 required to rebuild the source were not available.

Elimination of the confusion about the definition of a source should help simplify the rules for new source review. Many states had attempted to write a new source review regulation for both attainment and non-attainment areas.

Very truly yours,

James E. Walther/lg
Supervisor,
Air and Noise Programs

cc:
Dr. H. R. Amberg—ESD

7. Comments of American Textile Manufacturers Institute, Inc. (April 9, 1981)

April 9, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

RE: Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans. 40 CFR Parts 51 and 52. Proposed Rules FR Vol. 46 No. 48 Page 16280

Dear Mr. Trutna:

The American Textile Manufacturers Institute, Inc., is the central trade association for the textile industry. It represents organizations engaged in the manufacturing and finishing of all textile fibers with approximately 200 corporate members located in over 30 states. The Institute has reviewed the Environmental Protection Agency's proposed rules and offers the following comments.

We believe the proposal is a positive example of the type of regulatory relief that can be provided by this Administration without sacrificing either public health or welfare.

Modifying the definition of source for nonattainment areas to be an entire plant will provide greater flexibility in implementing pollution controls. The existing definition of "source" has prohibited the construction and operation of new facilities which could reduce the total amount of pollution being emitted. For example, we are aware of a

facility in the industry which has been prohibited from operating a new fabric coating line because a construction moratorium is in effect, even though the new coating line will result in a net decrease in emissions of approximately 90.5 tons per year. Obviously, this is not the intent of the Clean Air Act.

The amendments, however, do not address the requirement that net decreases be federally enforceable. In an area such as Rhode Island, where EPA has not approved the State Implementation Plan and has also not promulgated any such regulations of its own for the State, this requirement cannot be met. We recommend that it be amended to allow net decreases that are state enforceable.

Second, existing facilities which received a state permit to construct but were not eligible for a federal permit because of a construction moratorium should be grandfathered as long as no increase in emissions at the plant resulted.

We appreciate the opportunity to provide these comments and commend the Agency for their action.

Sincerely,

Maggie Dean
Technical Director
Environmental Affairs

MD/br

8. Comments of Congressman George Miller, 7th District, California (April 10, 1981)

April 10, 1981

Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Environmental Protectien Agency
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

I am writing to comment on the proposed rules that were printed in the *Federal Register* on Thursday, March 12, 1981, pages 16280 through 16282. These proposed rules would make a change in the Clean Air Act definition of a "source" of pollution. I strongly endorse this proposal, and urge the Environmental Protection Agency to make these rules final at the earliest possible date.

I have been very involved in the last nine months with a paper plant in my congressional district that is planning to install two new wood-fueled boilers. These boilers would replace two old oil-fueled boilers, resulting in less pollution, a substantial reduction in oil consumption and a stronger financial picture for the company. This company was prevented from building these new boilers because of the definition of "source" during the imposition of a construction moratorium, as we now have in California.

The lack of administrative discretion in this area prompted me to introduce legislation that would remedy this situation. Your proposed rule change would be helpful and I am pleased to lend it my support.

Thank you for the opportunity to comment on this important issue.

Sincerely.

George Miller
Member of Congress, 7th District
GM/rae

9. Comments of Arizona Department of Health Services (April 10, 1981)

April 10, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

Dear Mr. Trutna:

Re: Proposed Rules Published at 46 FR 16280, March 12, 1981, which are proposed to amend the PSD/new source review rules published at 45 FR 52676, August 7, 1980.

The State of Arizona wishes to be placed on record as strongly supporting these proposed rule amendments.

This is particularly so in the case of the proposal to redefine "Source" so that it will have the same definition and concept in a nonattainment area as it does in an attainment area. As pointed out in Arizona's comments on the originally proposed rules, submitted to Docket No. A-79-35 on February 28, 1980, in a state such as Arizona, where there are only two urban nonattainment areas and the primary cause of both is the automobile, no strategy applied to any stationary source would make any significant difference. The rule as published on August 7, 1980, would have had no substantial effect upon attainment status, would have operated to deprive the State of its latitude in choosing implementation strategy for Section 173 of the Act that would best fit local conditions, and would therefore have definitely been "excessively and unnecessarily burdensome." In addition, although we have no specific examples to support the conclusion, there seems to be little doubt that, as you point out, the August 7 definition could and would act as a disincentive to new investment and modernization by discouraging modifications to existing facilities.

The State of Arizona also concurs with and supports the proposal to eliminate the "reconstruction" test for new source review in nonattainment areas, particularly in the light of the redefinition of "source." We believe that adequate rules already exist, requiring review of new major sources "or alteration," to meet the requirements of the Act, on a case-by-case basis, without the additional complications generated by the "reconstruction" requirement.

The State of Arizona appreciates the opportunity to comment on these progressive and forward-looking proposals.

Sincerely,

Ronald L. Miller, Ph.D.
Acting Assistant Director
Environmental Health Services

RLM:DEM:ms

10. Comments of Ohio EPA (April 10, 1981)

April 10, 1981

Mr. Michael Trutna
Standards Implementation
Branch (MD-15)
Office of Air Quality Planning
& Standards
Research Triangle Park, NC 27711

Dear Mr. Trutna:

This letter is written to comment on the March 12, 1981 *Federal Register* in which the definition of "source" in nonattainment area is proposed to be modified. We are supportive of the proposed revision to the federal definition. It will more readily allow new source development in the major urban areas.

On the state level, we will continue to require the installation of Best Available Technology on all new sources, regardless of location. We believe new sources should be equipped with the latest cost-effective control measures. By continually installing cleaner new sources to replace older sources, we can improve air quality.

Thank you for this opportunity to comment on these proposed changes.

Sincerely,

James F. McAvoy
Director

JFM:tln
42000.0

11. Comments of State of Maryland Department of Health and Mental Hygiene Office of Environmental Programs (excerpted) (April 13, 1981)

April 13, 1981

Mr. Michael Trutna
Standards Implementation Branch
(MD-15)
Office of Air Quality Planning
and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

EPA published in the Federal Register its proposal to modify the definition of source as it would apply to non-attainment areas so that the definition would be identical to the definition of source applicable to the PSD program as modified August 7, 1980. EPA has indicated in its proposal that the intent is to define source as a "plant", and that this definition would reduce the activity within each of these programs and also minimize the moratorium under Section 110 of the Act which applies in nonattainment areas within states lacking an approved SIP. Maryland is in agreement with the concept of this proposal in that it is desirable to maintain consistency within similar programs. We also agree, generally, that there is little benefit in embarking on a new source review of any type if there is no impact on the ambient air. However, we believe that there are other considerations to be made prior to approving these changes. Our comments on the proposed definition change are as follows:

* * *

Another problem is that we believe EPA has misinterpreted the purpose of §173 of the Act. We believe Congress spoke clearly when it called for LAER and RFP in a State operated offset-type SIP. EPA has not attempted to show that a mistake was made by Congress in its preamble to the proposed rule. It would appear to us that by the obvious nature of the language, more was required of a new source than just a one-

for-one offset. We conclude that technology for its own sake was intended for new sources in non-attainment areas just as Congress intended for the NSPS source. Hence, the reasoning for retaining the reconstruction definition for NSPS purposes is the same for saving it for non-attainment area purposes.

In conclusion, although we believe that there is a need at times to maintain consistency within the many parts of the air program, we believe that there should be a significant difference in reviewing a new, modified or reconstructed source in a PSD area as compared to an area which exceeds health related standards. In the non-attainment area, the States are having great difficulties finding ways to reduce emissions sufficiently to demonstrate achievement of many National Ambient Air Quality Standards. It appears as if your proposed amendment will further aggravate this problem and we, therefore, suggest strongly that you abandon the proposal.

Sincerely yours,

George P. Ferreri, Acting Director
Air Management Administration

12. Comments of Natural Resources Defense Council, Inc. (April 13, 1981)

Comments on the
Proposed Change in the Definition of
"Source" in Nonattainment Areas
and the
Proposed Deletion of the "Reconstruction"
Rule in Nonattainment Areas
46 Fed. Reg. 16280 (March 12, 1981)

Prepared by
David D. Doniger

April 13, 1981

The Natural Resources Defense Council submits these comments in opposition to two proposals issued March 12, 1981, which would seriously weaken the federal and state programs for meeting the minimum standards for healthful air in heavily polluted areas of the country.

EPA first proposes to redefine what constitutes a "source" in nonattainment areas in a way that would seriously delay attainment of the health standards. EPA currently defines "source" as both an entire plant and as the major pollution-emitting components within it. Whenever a new component is added or an existing one modified to produce a major increase in emissions, three stringent conditions must be met: use of the best technology, net reduction in the area's emissions, and compliance with pollution limits by all commonly-controlled sources. The Agency now proposes to define a "source" as an entire plant only. This would allow major new or modified components to escape these conditions so long as total plant emissions do not increase in major amounts. Instead of promoting attainment, most growth merely would keep area-wide emissions constant at best. This definition of "source" is inconsistent with the purposes of the nonattainment program of the Clean Air Act and therefore is unlawful.

EPA also proposes to abandon the "reconstruction" rule, which treats rebuilding an existing source as construction of a new one if more than half its capital value after rebuilding represents new investment. This rule is necessary to prevent sources from escaping the conditions on growth in nonattainment areas by continual piecemeal refurbishment. To allow such permanent evasion of the Act's requirements for use of the best technology and the other conditions on growth would be contrary to the Act's goal of rapidly meeting the health standards. Thus this proposal is also unlawful.

The proposals also fail to meet procedural requirements of the Clean Air Act. The support for the factual premises of a rule must be set forth at the time a rule is proposed, so that the public may have the opportunity to scrutinize and comment on the evidence. Here EPA has asserted several reasons for changing these rules which are questions of fact, yet the Agency has made available no factual support for its assertions. The factual, support, if any exists, must be made available for comment before these proposals may go any further.

If these proposals were promulgated, serious delays in meeting the federal health standards would occur. Attainment could be set back many years in some areas. This would substantially injure thousands of NRDC's members and millions of other Americans who live in nonattainment areas and whose health is threatened by air pollution there.

In light of their substantive and procedueral defects, these proposals must be withdrawn.

I. The Proposed Redefinition of "Source"

The nonattainment provisions of the Clean Air Act establish a demanding program of pollution control for the areas of the country that still fail to meet the primary air quality standards, set at the levels needed to protect public health. The standards must be met "as expeditiously as practicable," but no later than 1982 (1987 for carbon monoxide and ozone), and "rea-

sonable further progress" towards the standards must occur in the intervening years. Sections 171, 172.

Because the health of people living in nonattainment areas is endangered, the Act subjects pollution sources there to more stringent emission control requirements than sources located elsewhere. New or modified sources which would emit at least 100 tons per year of a criteria pollutant must receive a permit before construction (a process known as "new source review"). The permit may be granted only if the source meets three conditions designed to assure that new growth actually contributes to, rather than hinders, attainment of the health standards:

(1) the proposed source must meet the "lowest achievable emission rate" (LAER),
(2) the owner or operator must obtain a net reduction in the area's emissions sufficient to amount to "reasonable further progress" (usually through a greater-than-even emissions "offset"), and
(3) All other sources in the area under common control must be in compliance with state and federal emission limits.

Section 173.[1]

Recognizing the intention of Congress to make growth contribute to attainment rather than hinder it, EPA regulations to this time have always defined "sources" subject to new source review to include the separate process units or pieces of pollution-emitting equipment within large industrial plants, as well as the entire plants themselves. Under these rules, every new or modified process unit or piece of equipment that itself may emit 100 tons per year is subject to new source

[1] In addition, a fourth condition is that after July 1, 1979, an area where a new or modified source is proposed must have an adequate implementation plan approved by EPA before a permit may be issued. Section 110.

review and the pollution-reducing conditions summarized above.

EPA now proposed to change course dramatically. EPA proposes to redefine "source" in nonattainment areas as solely the whole plant. As redefined, so long as offsetting reductions were made elsewhere in the plant that simply kept the whole plant's emissions from increasing by 100 tons, new or modified components of the plant would escape the requirements of LAER, net emission reductions, and compliance by other commonly controlled sources, no matter how much the components themselves emitted.

Redefining "source" only as entire plants for the nonattainment program would be unlawful. The cases reviewing prior attempts to do so under other programs of the Clean Air Act have established that EPA may not give the term "source" a meaning that is inconsistent with the purposes of the program concerned. *Alabama Power Co.* v. *Costle*, 13 ERC 1993, 2039 (D.C. Cir. 1979); *ASARCO* v. *EPA*, 11 ERC 1129, 1135-36 (D.C. Cir. 1978). Defining a "source" as an entire plant would not be consistent with the purposes of either the new source review provisions or the nonattainment program as a whole, because it would substantially impede the attainment of the health standards in these areas.

When a nonattainment area will meet the health standards depends heavily on the reach of new source review. If substantial growth were allowed to occur without making the maximum feasible emission reductions as required by LAER, without net emission reductions sufficient for "reasonable further progress," and without compliance by other sources under common control, then attainment would be substantially delayed. In fact, sources could be routinely constructed or modified *adding* up to 100 tons per year to a nonattainment area's pollution burden. With new emissions poorly controlled and one spur to compliance with existing limits by other sources removed, even greater reductions would be necessary from existing sources, at greater difficulty, cost, and delay. The reductions available from existing sources are not unlim-

ited. Many areas that now will meet the standards by the deadlines would fail. Even areas that now are not anticipated to meet the deadlines would fall further behind. The setback to attainment of the health standards would mean greater health risk and more illnesses and premature deaths among the population of the nonattainment areas. This would be completely contrary to the purposes of the nonattainment program and EPA therefore may not adopt this definition.

The purpose of the nonattainment program is not to hold emissions constant. It is certainly not to sanction steady increases in pollution in 100 ton increments as a result of continued growth. The purpose of this program is to *reduce* pollution in order to achieve the primary standards for protection of health as expeditiously as practicable. According to the House Report on the 1977 amendments, the nonattainment program, including the stringent new source review rules, is intended "as a means of assuring the dual goals of attaining air quality standards and providing for new economic growth," and "to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date."[2] Of the LAER reqirement in particular, the Report stated:

> [M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the requirement for reasonable further progress. . . . Finally, the technology-forcing purpose of the Act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas.[3]

It is simply incompatible with these legislative purposes for EPA to adopt a definition of "source" which shields a substantial portion of new investment in nonattainment areas from the requirements for use of the best pollution controls and for achievement of progress toward the standards.

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[2] H.R. Rep. No. 294, 95th Cong., 1st Sess. 13, 211 (1977)
[3] *Id* at 215.

In *ASARCO*, the court held that defining "sources" only as entire plants conflicted with the purposes of new source performance standards (NSPS's). The court stated that NSPS's "are designed to *enhance* air quality" by making all new and modified sources use advanced control technology. Defining sources only as entire plants, however, "postpones the time when the best technology must be employed and *at best* maintains the present level of emissions." The court continued:

> Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements. The "best" pollution control technology would never have to be installed, and existing plants would use up much of the available clean air, inhibiting construction of new plants. . . .

This, the court concluded, was "contrary to . . . the basic purpose of the Act." 11 ERC 1135–36, 1137 n. 40. (emphasis added).

These conclusions apply with even greater force to the nonattainment program, which calls for even more effective control technology that the NSPS program (LAER), creates additional offset and compliance requirements, and even more than the NSPS program is intended to improve air quality. As the 1977 Senate Report stated:

> The need for procedures to assess air quality impacts and limit introduction of new facilities is most acute where such facilities will prevent attainment or maintenance of a national air quality standard.[4]

For the prevention of significant deterioration (PSD) program, EPA regulations currently define "sources" as entire plants. The proposal here under review claims that having different definitions of "source" for different programs is an inconsistency. But in *Alabama Power*, the court upheld the

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[4] S. Rep. No. 127, 95th Cong., 1st Sess. 56 (1977).

current PSD definition precisely because the purpose of the PSD program is different from that common to the NSPS and nonattainment programs. PSD's purpose is *not* improving air quality. It is *protecting* existing air quality, where air is still clean. PSD even explicitly permits a limited decline in existing air quality in clean air areas. Because of the difference in program purposes, *Alabama Power* both distinguished and reaffirmed *ASARCO's* rejection of the whole-plant definition. *See* 13 ERC 2040, 2044. Thus *Alabama Power*, as well as *ASARCO*, clearly indicates that the whole-plant definition proposed for the nonattainment program would be unlawful.[5]

None of the seven "reasons" EPA offers at 46 Fed. Reg. 16281 in fact supports the proposed change. We consider them in turn.

Reason 1: Application of the construction permit restrictions. EPA notes that some areas which still have not submitted approvable SIP's are subject to permit restrictions. The Agency then implies that no purpose is served by barring

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[5] The proposed redefinition also conflicts with the definition of "source" understood and intended by Congress when it adopted the nonattainment provisions. In section 129(a) of the 1977 amendments (continuing until mid-1979 the EPA "interpretative ruling" allowing continued growth after the original 1975 deadline for attainment) Congress made explicit reference to the then-existent EPA policy on growth. That policy was premised on defining "sources" as the components of a plant as well as the entire plant.

Section 129(a) does permit EPA to modify the interpretive ruling. However, the purpose of Section 129 was to place more stringent pollution-reducing conditions on growth in nonattainment areas after mid-1979 than existed under EPA's interpretive ruling to that point. Modifications of the ruling by redefining "source" as an entire plant would have substantially weakened those conditions rather than strenghtened them, and thus would have been unlawful. Modifying the definition of "source" in this manner now also would make the requirements of Part D weaker than those adopted by Congress in 1979 in Section 129. Therefore, the proposed redefinition would be fundamentally inconsistent with the understanding and purposes of Congress in 1977.

construction which would produce "no increase" in pollution. (It bears noting that this statement is incorrect; increases up to 100 tons per year could occur.) The construction restrictions are simply an incentive Congress has chosen to encourage states to develop approvable plans. Removing some sources from the reach of the restrictions would only weaken the effectiveness of the incentive and delay further the development of approvable plans.[6] The blame for the application of the restrictions to "no increase" construction lies not with the definition of "source" but with whatever shortcoming in the SIP's precludes approval. Adopting a "source" definition that is fundamentally inconsistent with the purposes of the program is a completely inappropriate remedy.

Reason 2: Alleged disincentive to new investment and modernization. The proposal claims that the application of new source review to components of plants discourages new investment and modernization. No data has been offered to support the claim that this effect is significant or exists at all. EPA's assertion is merely speculation.

The marginal cost of building plant components in compliance with the LAER, offset, and enforcement requirements of the nonattainment program (over and above the cost of meeting the NSPS for such components) is small when compared to the total cost of new construction or modernization. Thus it is likely any disincentive to new construction is small.

If any data does exist which EPA believes shows a significant effect, the Agency has committed a serious procedural error by not making it available for public review and comment. Section 307(d)(3) of the Clean Air Act requires EPA to make available, when a rule is proposed:

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[6] Indeed, the construction restrictions are intended to bar precisely this type of construction. See Section 129(a) of the 1977 amendments, discussed in the previous note.

(A) the factual data on which the proposed rule is based; [and]
(B) the methodology used in obtaining the data and analyzing the data. . . .

EPA will have to make any such data available to the public and allow a new period for comment before promulgating these rules.

Even if such a disincentive were demonstrated, it would provide no basis for excluding a substantial portion of investment and modernization from the Clean Air Act's requirements for protection of health. Congress explicitly recognized that the nonattainment program is a compromise reconciling the need for continued growth and the need for continued emission reductions. The prior statute, before the 1977 amendments, allowed no growth at all in nonattainment areas. Congress explicitly determined to accept the marginal cost of the nonattainment requirements in order to speed attainment of the health standards.

Reason 3: Alleged retarding of pollution control progress. The claim that the proposed change in the definition of "source" would spur pollution control progress is vastly overstated. Only in the few instances where the new or modified plant emitted *less* than the prior plant would there be any "progress in air pollution control." More often the whole-plant approach would let emissions stay constant at best and often would allow emission to increase. *Any* growth that occurs under the current definition of "source" leads to progress towards the health standards. Very little growth that would occur under the proposed definition would lead to progress.

Reason 4: Alleged confusion and inconsistency. There is no inconsistency between the different definitions of "source" under the nonattainment purposes that require different "source" definitions.

As for confusion, any industry contemplating construction or modification of a source, and any state or federal agency involved in the implementation of the Clean Air Act, certainly has at its command the minimal legal assistance needed to

understand this aspect of the programs and the reasons for their differences.

Reason 5: Alleged non-interference with the nonattainment program's fundamental purpose. We have already shown that releasing a substantial fraction of new investment in a nonattainment area from the pollution-reducing conditions of the nonattainment program would substantially slow the attainment of the health standards. Poor control of new sources (due to failure to meet LAER) means that more emission reductions must be found from existing sources. There are practical limits on the reductions available from existing sources. The greater reductions needed for attainment would come only at substantially greater difficulty, cost, and delay.

Reason 6: Claim that NSPS represents "the most up-do-date" controls. The NSPS's by definition are not "the most up-to-date" pollution control techniques. They are a minimum requirement for new sources and nearly always allow more pollution than the best plants already in operation. Relatively heavy weight is given to cost considerations. Often, NSPS's are old and fail to reflect subsequent improvements in control technology since put into practice.[7]

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[7] See the findings of the Report of the National Commission on Air Quality at page 2.1-64 (March 1981):

291. New source performance standards adopted by EPA generally require the use of good controls, but, because of energy, economic, and other environmental considerations, the standards often do not require technology that would achieve the lowest possible emission levels. The consideration of such other factors by EPA is required under Section 111. In some cases, EPA does not require the maximum level of control because of the way in which the controls would affect manufacturing processes (See p. 3.7-2, 7).

292. In many cases, new sources can reduce emissions more than is required by existing new source performance standards not only because maximum control levels usually are not required when the standards are adopted but also because new control

Congress created the LAER requirement precisely to make new and modified sources in nonattainment areas use technology better than NSPS's. The NSPS is the most lenient level at which LAER may be set. LAER is defined as pollution control as good as that used at the best existing plant anywhere in the world, or the greatest level of control required by any state, whichever is more stringent. As the House Report indicated, costs are to have less weight in LAER determinations than in NSPS's, because the public health is at stake in nonattainment areas.[8]

Furthermore, as the proposal admits, there are no NSPS's for many source types. The case-by-case LAER review is essential to requiring some consideration of what constitutes good technology for these sources.

For all these reasons, reliance on NSPS's is no substitute for the nonattainment program Congress established for the dirty areas.

Reason 7: Significant increases in entire-plant emissions will still be reviewed. The fact that construction or modification which adds more than 100 tons per year from an entire plant will still be subject to new source review is no justification for eliminating review of the many major new or modified components of plants. The purpose of the nonattainment program requires review of both whole-plant and component emission increases.

Because the proposed redefinition of "source" would conflict with the fundamental purposes of the nonattainment program

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technologies become available over time and because improvements in existing technology can be accomplished to achieve more control (See p. 3.7-2, 3).

293. Consideration of factors, such as costs, in some cases may indicate that more stringent controls should not be required even when increased control is technologically possible (See p. 3.7-2, 3).

[8] H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (1977).

it would be unlawful and may not be promulgated. The proposal must be rewritten.

II. The Proposed Deletion of the "Reconstruction" Definition

Current EPA regulations treat the rebuilding of an existing facility as construction of a new one where more than 50 percent of the source's capital value (after rebuilding) represents new investment. This "reconstruction" rule applies under both the NSPS and nonattainment programs.

The rule is necessary to keep sources from perpetually evading the requirements to meet LAER and the other pollution-reducing conditions on growth in nonattainment areas through continual piecemeal refurbishment of plants.

The two reasons EPA advances for abandoning this rule will not support this action. First, while EPA admits the reconstruction rule is appropriate for NSPS's, the Agency claims it is not needed under "a program of review basically designed to meet air quality standards." 46 Fed. Reg. at 16282. To the contrary, the reconstruction rule is *more* needed under the nonattainment program. The rule supports the purpose of the NSPS program, recognized in *ASARCO*, of improving air quality. That purpose is even stronger, as we have shown, in the nonattainment program. This "reason" therefore will not support abandoning the reconstruction rule.

Second, EPA contends the reconstruction rule is unneeded if "source" is redefined as an entire plant only. But that definition would be unlawful, as we have shown. Thus this reason also will not support the change.

Conclusion

For the foregoing reasons, neither proposed rule change would be lawful or reasoned. In addition, the rule change would be invalid insofar as it rests on factual premises whose support, if it exists, has not been disclosed for scrutiny and comment. NRDC requests the withdrawal of both proposals.

13. Comments of County of Erie, New York, Department of Environment and Planning (April 16, 1981)

April 16, 1981

Mr. Michael Trunta [sic]
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711
Re: EPA Air Rules-40 CFR Parts 51 and 52
(Source Definition

Dear Mr. Trutna:

We fully support the proposal to provide a consistent definition of source for PSD and Non-Attainment purposes.

We have long felt that the current variation and definitions discriminated against the older communities in the Northeast.

The current definition has increased the difficulty in applying the trade-off and bubble concepts promoted by EPA. The proposed change will allow more creativity and innovative approaches to both meeting ambient monitoring standards and allowing economic development to occur.

We urge the earliest action on this revision.

Very truly yours,

Anthony T. Voell, P. E.
Deputy Commissioner

ATV:jk
cc: G. Kotas
M. Raab

14. Comments of State of California Air Resources Board (April 28, 1981)

April 28, 1981

Mr. Michael Trutna
Standards Implementation Branch
Office of Air Quality Planning
and Standards
Research Triangle Park
North Carolina 27711

Dear Mr. Trutna:

Subject: March 12, 1981 Proposed Changes to New Source Review Requirements.

This is in response to EPA's proposal to change the definition of "source" contained in the rules governing nonattainment area new source review rules to conform to that contained in the Prevention of Significant Deterioration (PSD) regulations. The California Air Resources Board is in general agreement with this proposal, since it is consistent with the policies most California air pollution officials have followed since 1976. EPA's proposal is also consistent with a new NSR/PSD rule which was developed jointly by the California Air Pollution Control Officers Association (CAPCOA) and the Air Resources Board. However, there may be some cases where the new definition will not be sufficient to meet commitments made in the 1979 Nonattainment Plans.

As we understand it, EPA is proposing to change its definition of "source" to one that is plant-wide, as opposed to the dual existing emission-point and plant-wide definitions. The intent of this action is to subject fewer sources to new source review, since only net emissions increases would be used to determine the applicability of NSR. The ARB agrees with this concept as a minimum

requirement, but believes that local jurisdictions should have the prerogative of using a more stringent approach. Many areas in California have identified the need for a more stringent NSR rule, and should not be prohibited from using the previous EPA policy. In some cases, an emissions reduction credit was claimed for NSR rules in the 1979 plans and approved by EPA. If EPA's changes were mandated on the states, the plant-wide definition of "source" could impair a region's ability to demonstrate Reasonable Further Progress by reducing the stringency of NSR rules.

In summary, we support this rule change because it provides more flexibility for industry, regulatory agencies, and local jurisdictions while meeting the goals of clean air. We trust that consistent with the new Administration's support for maximizing local control, EPA will allow state and local agencies the ability to adopt more stringent programs, should they wish to do so.

Please direct any further questions on this matter to Ron Friesen of my staff at (916) 322-6026.

Sincerely,

Gary Rubenstein
Deputy Executive Officer

D. Declarations Supporting Or Opposing Petitioners' Motion For A Stay And For Other Relief Pending Review:

1. Declaration of Robert S. Proctor In Opposition To Petitioners' Motion For A Stay And For Other Relief Pending Review (December 14, 1981)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 I Street, N.W., Suite 600
Washington, D.C. 20006

CITIZENS FOR A BETTER ENVIRONMENT, INC.,
59 East Van Buren, Suite 1600
Chicago, Illinois 60605

and

NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
5650 West Central, Suite B
Toledo, Ohio 43615

Petitioners,

v.

ANNE M. GORSUCH,
ADMINISTRATOR,
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Respondent.

AMERICAN PETROLEUM INSTITUTE,
CHEVRON U.S.A. INC., et al.

Applicant-intervenors.

No. 81-2208

I, ROBERT S. PROCTOR, do hereby declare and testify as follows:

1. I am Vice President and General Manager, Manufacturing Department, of Chevron U.S.A. Inc. ("Chevron"), applicant-intervenor in the above-captioned litigation. In that capacity, I am responsible for the operation of all of Chevron's refineries, including the design and construction of capital improvements in those refineries.

2. At the present time, Chevron's sole manufacturing facility for high-viscosity-index ("high V.I.") lubricating oil base stocks, built in the late 1930's, is located in Richmond, California (the "Richmond Refinery"). These oil base stocks are blended at the Richmond Refinery and other locations to produce high V.I. lubricating oils used in industrial and vehicular engines. Because many available crudes are unsuitable for manufacture into high V.I. base oils at the Chevron Refinery and because of the declining operating reliability of the Richmond Refinery's existing lube oil plants, Chevron must purchase an increasing amount (now over half) of its base oil supply from other foreign and domestic suppliers. As the demand for high V.I. lube oils continues to increase, world manufacturers will have less lube base stocks available for purchase. Accordingly, Chevron forecasts that it will be increasingly difficult to meet future demand in the West Coast states—California, Oregon and Washington—as well as in other market areas.

3. In order to meet this demand, Chevron plans to begin construction in March 1982 of an improvement to the Richmond refinery known as the Richmond Lube Oil Project. The Richmond Lube Oil Project has two primary goals: (1) reduce Chevron's dependence on foreign crudes by enabling its Richmond refinery to manufacture high V.I. lube base oils from all domestic crudes; (2) enable Chevron to manufacture high V.I. lubricating oils more efficiently by replacing old equipment installed in the late 1930's with modern energy-efficient equipment.

4. Chevron estimates that this project will cost in excess of $500,000,000. Based on discussions with agency officials

and progress to date Chevron expects to obtain all necessary permits in February 1982 from the Bay Area Air Quality Management District ("Bay Air District") and the City of Richmond. Chevron plans to begin construction in March 1982 immediately after obtaining these permits. Chevron estimates that the Richmond Lube Oil Project will begin operating 27 months after construction begins. Therefore, operation of the Richmond Lube Oil Project will not have any effect on air quality until, at the earliest, June 1984. When completed, the Richmond Lube Oil Project will create 45 additional full time jobs. At its peak, construction of the project will require 1200 full time workers.

5. The Bay Air District has issued preliminary notice of intent to grant a permit authorizing the construction of the Richmond Lube Oil Project. A true copy of the summary of analysis prepared for this permit by the Bay Air District and distributed for public comment is attached to this declaration as Exhibit A.

6. The Bay Air District recognized (and required) in its notice of intent to issue its permit that the Richmond Lube Oil Project will use the "best available control technology" (equivalent to Federal "lowest receivable emission rate") to minimize the release of air contaminants into the atmosphere.

7. Moreover, as summarized in Table One on page three of the Bay Air District's analysis, the Richmond Lube Oil Project would result in a net decrease in emissions into the atmosphere. Specifically, the Bay Air District estimates that emissions of sulphur dioxide would decrease by 45.52 pounds per hour, nitrogen oxide by 15.27 pounds per hour, carbon monoxide by 10.85 pounds per hour, hydrocarbons by 18.22 pounds per hour and particulate matter by 4.20 pounds per hour. Thus, contrary to petitioners' assertion that the "proposed permit fails to mandate greater-than-even offsets" (Memorandum in Support of Petitioners' Motion for a Stay and for Other Relief Pending Review, page 25), there would be less emissions into the air from the Richmond Refinery after construction of the Richmond Lube Oil Project than before.

8. In any event, the air in and around the Richmond Refinery meets all primary Federal ambient air quality standards, as indicated in the San Francisco Bay Area Annual Air Quality Report for 1980, dated July 1981, prepared by the Association of Bay Area Governments, Bay Area Air Quality Management District and Metropolitan Transportation Commission. True copies of the maps from the Report showing such attainment is attached to this declaration as Exhibit B (we have shaded the actual attainment areas green and actual nonattainment areas red).

9. The timetable for permitting the Project is critical. The Bay Air District air permit public comment period closes December 20, 1981, and the air permit will be issued following completion of the project Environmental Impact Report ("EIR"). A true copy of the Proposed Schedule for the project EIR is attached to this declaration as Exhibit C. Even a one or two week stay would disrupt this schedule, resulting in delays far beyond the length of the stay ordered by the Court.

10. Chevron would be substantially and irreparably injured if construction of the Richmond Lube Oil Project were delayed pending a final decision by the Court in the instant litigation:

(a) A delay in construction would entail substantial loss to Chevron as a result of rising costs for labor, equipment and materials. Chevron has already suffered an estimated $6,000,000 in additional costs due to the postponement of construction start up from October 1981 to March 1982. Chevron estimates that an additional delay of six months would result in $6,000,000 additional construction costs. A delay of one year would result in engineering inefficiencies and added construction costs amounting to $25,000,000.

(b) In order to keep the projects on schedule, Chevron has already placed orders for much of the material and equipment necessary to begin construction in March 1982. A delay in construction would require Chevron to either cancel these orders or pay for storage of the equipment ordered. Chevron estimates that the loss entailed by such cancellation and storage costs would be in excess of $50,000,000.

(c) Chevron estimates that the Richmond Lube Oil Project will generate an additional $300,000 in revenue per day when it becomes fully operational. A delay in construction would result in a loss of revenue at this daily rate until the project begins production.

(d) As a result of the inability of the existing Chevron Richmond Refinery to meet increased demand for high V.I. lubricating oil, Chevron's share of the market for this product would decline significantly if the Richmond Lube Oil Project is not completed as scheduled in June 1984 and Chevron were unable economically to purchase a continuing supply of base stocks. Even if the Richmond Lube Oil Project is completed at a later time, Chevron probably would be unable to fully recapture its prior share of the market because its competitors would have had time to solidify their relationships with customers which Chevron was unable to service due to its limited production capacity.

(e) Chevron has already spent approximately $45,000,000 on the engineering and design of the Richmond Lube Oil Project. If construction is substantially delayed, it is highly probable that Chevron would be forced to revise a substantial portion of these engineering and design plans. The engineers and designers of the Richmond Lube Oil Project would then have to be laid off or reassigned, and Chevron would incur further costs and delays to reassemble the project engineer and design team.

Executed under penalty of perjury this 14th day of December, 1981 at San Francisco, California.

Robert S. Proctor

Exhibit A

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109

SUMMARY OF ANALYSIS
CHEVRON LUBE OIL PROJECT
Permit Application #27797

November 10, 1981

by the Staff of the BAAQMD

* * *

TABLE 1
EMISSION SUMMARY

Source	SO_x (as SO_2) Lb/Hr	NO_x (as NO_2) Lb/Hr	CO Lb/Hr	VOC Lb/Hr	Part. Matter Lb/Hr
Current Baseline[1]	−0.50	−26.05	−2.18	−1.37	−1.28
Increases from Project[2]	14.05	64.99	13.58	50.05	5.20
Reductions from Project[3]	−59.07	−54.21	−22.25	−66.90	−8.12
Increases from Additional Crude Oil[4]	—	—	—	—	—
Cumulative Net Change	−45.52	−15.27	−10.85	−18.22	−4.20

[1] The basis for the Refinery current baseline is from permitted new and modified sources since 12/20/77 and is recorded in past correspondence.

[2] As shown in Table 2, these increases are from the proposed new and modified plants and increases elsewhere in the Refinery caused by the project, except for processing more crude oil.

[3] As shown in Table 3, these reductions are from shutting down old plants, burning less fuel oil, and providing better CO control at the PA Plant.

[4] Any possible increase of emissions due to additional crude oil processing will be offset by reductions from within the refinery. These reductions which are part of the bubble will be outlined in the Environmental Management Plan.

* * *

[Exhibits B and C omitted in printing]

2. Declaration of Milton Feldstein In Opposition To Petitioners' Motion For A Stay And For Other Relief Pending Review (December 22, 1981)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 I Street, N.W., Suite 600
Washington, DC 20006

CITIZENS FOR A BETTER ENVIRONEMENT, INC.,
59 East Van Buren, Suite 1600
Chicago, Illinois 60605

No. 81-2208

and

NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
5650 West Central, Suite B
Toledo, Ohio 43615

Petitioners,

v.

ANNE M. GORSUCH,
ADMINISTRATOR,
U.S. Environmental Protection Agency
401 M. Street, S.W.
Washington, DC 20640

Respondent.

I, MILTON FELDSTEIN, do hereby declare and testify as follows;

1. I am the Air Pollution Control Officer for the Bay Area Air Quality Management District ("District"). In that capacity, I am responsible for the management of the District, including the implementation of the District's new source review rules and its air quality planning process.

2. A true copy of the District's permit rules is attached hereto as Exhibit A. These permit rules have been developed over a period of approximately nine years and are generally regarded as among the most stringent in the country. This latest version was approved by the District's Board of Directors on October 7, 1981. This latest version is, in numerous respects, more stringent than earlier versions of the District's permit rules albeit less stringent than petitioner Citizens For A Better Environment urged the Board of Directors to adopt. On November 16, 1981, Region IX of the U.S. Environmental Protection Agency stated that the latest version of the rules has been found approvable under the Clean Air Act and commended the staff of the District of its work in developing the rules. Moreover, Region IX stated it was preparing an approval package for submission to EPA's Washington headquarters for concurrence and publication. Prior to the review and approval of those rules by Region IX of EPA, the State of California Air Resources Board had reviewed this latest version of the rules, determined that it satisfied the requirements of the Clean Air Act and submitted it to Region IX of EPA for inclusion in the State Implementation Plan.

3. The Petitioners' Motion for a Stay and their Memorandum in Support of said Motion contain numerous errors and misstatements relative to the latest version of the District's permit rules as approved by the District's Board of Directors on October 7, 1981.

4. The petitioners' allegations are incorrect in all of the following particulars: (1) that the District's permit rule does not provide for greater-than-even emission offsets (Memorandum in support of Stay at p. 24); (2) that it will not accomplish a net reduction in the area's pollution (Memoran-

dum, p. 24); (3) that when a new installation is built, the District requires only enough offsetting reductions to hold the emissions increase below certain threshold levels (Memorandum, p. 24); (4) that the permit rule shares the alleged defect of the new federal definition of "source" and thereby allows a continual increase in pollution with each additional project (Memorandum, p. 24); and (5) that a proposed permit to Chevron USA fails to mandate greater-than-even offsets (Memorandum, p. 25).

5. The District's new source review does in fact require either 2:1 or 1.2:1 offsets in all cases involving emission increases more than 250 lb/day, unless such increased emissions will not interfere with the attainment or maintenance of any national ambient air quality standard. (See Sections 2-2-303 and 2-2-304 of attached rule for the specific offset requirements.) Moreover, contrary to petitioners' suggestion, this rule does not allow "continual increases"; in fact, this rule requires that all cumulative increases in emissions from a given facility which accrue more than 250 lb/day (or 550 lb/day of NO_x) over a specified period of time (see Section 2-2-203 or the attached Rule for the definition of "cumulative increase," which sets forth the relevant criteria) must be offset in accordance with the requirements of Sections 2-2-303 and 2-2-304 of the attached Rule.

6. In those cases where a facility seeks to obtain a permit for a new or modified source under the "bubble" concept, which requires that the modified facility taken as a whole will emit no more after the modification than it did before, a net reduction in emissions will also occur in virtually all cases. This results since the maximum emissions allowed by the permit on the modified facility will be based on the actual emissions from the old facility, averaged over a period of years, or "baseline." Thus, unless the modified facility operates at all times at a level equivalent to maximum baseline emissions, there will inevitably be some reduction in emissions from the modified facility.

7. The petitioners incorrectly allege that the "breathing public (sic) in the Bay Area is being harmed by the excess

pollution to come from new facilities like Chevron's" (Memorandum p. 26). A true and correct copy of the District's Summary of Analysis of the Chevron Lube Oil Project (the proposed "new facilities" referred to by petitioners) is attached hereto as Exhibit B. This Summary of Analysis (which was duly noticed and distributed for public comment a little over one month ago) specifically contradicts petitioners' allegations. Indeed, our preliminary analysis of Chevron's proposal (as summarized in Table One on page three of Exhibit B) shows that this project will actually result in a net decrease in emissions to the Bay Area atmosphere. Specifically, we estimate that emissions of sulfur dioxide would decrease from Chevron's refinery by 45.52 pounds per hour, nitrogen oxide by 15.27 pounds per hour, carbon monoxide by 10.85 pounds per hour, hydrocarbons by 18.22 pounds per hour and particulate matter by 4.20 pounds per hour. The District is continuing to review some relatively minor data revisions to be submitted by Chevron and will issue an up-dated Summary of Analysis after completion of this review.

8. A greater-than-even intra-plant offset requirement, as requested by Petitioners, would not significantly assist attainment of any ambient air quality standards in the Bay Area. For example, since December 20, 1977 the total reduction in emissions attributable to the new source review aspect of the District's permit rule has amounted to a reduction of emissions totaling about 2.5 tons per day of hydrocarbons. If it were assumed that the ratio proposed by petitioner Citizens For a Better Environment to the District's Board of Directors (i.e., a 20% discount) were used and that it was applicable to the total reduction, the total reduction would have been increased by only about 0.5 tons per day. Moreover, testimony presented by other parties to the District's Board of Directors indicated that such a ratio would encourage industry to operate old polluting sources longer and would therefore be counterproductive.

9. An automobile inspection and maintenance program is of far greater importance to air quality planning in the San

Francisco Bay Area. Such a program is estimated to reduce emissions of hydrocarbons by 45 tons per day in the Bay Area. The District is vigorously endeavoring to obtain approval of such a program from the California Legislature.

10. The District strongly opposes the requested stay of EPA's approval of the District's permit rules. As noted above, these rules have heretofore been approved by the District's Board of Directors, the California Air Resources Board, and Region IX of EPA. Any stay of official EPA approval of these rules, or any other indication that the California SIP needs any substantial additions beyond legislative authorization of a vehicle inspection and maintenance program, could seriously impair the likelihood of obtaining any legislative authorization for such a program.

Executed under penalty of perjury this 22nd day of December, 1981, at San Francisco, California.

Milton Feldstein

[Exhibits omitted in printing]

3. Declaration Of Jeffrey Gabe In Support Of Petitioners' Motion For A Stay And For Other Relief Pending Review (January 5, 1982)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., — No. 81-2208

Petitioners,

v.

ANNE M. GORSUCH,

Respondent,

ALABAMA POWER COMPANY, et al.,

Applicant-intervenors

I JEFFREY GABE, under penalty of perjury do say:

1. I am employed by Citizens for a Better Environment (CBE) and serve as the Research Director of the San Francisco office where one of my major responsibilities is to represent CBE in matters pertaining to air quality. As a part of my activities in this regard I monitor permit activities at the Bay Area Air Quality Management District and the general progress of the Bay Area towards attaining and maintaining ambient air quality standards.

2. The entire Bay Area is currently designated as nonattainment for the federal primary standards for ozone and carbon monoxide. The ozone problem is considered to be a regional one. Emissions of ozone precursors (hydrocarbons and nitrogen oxides) anywhere in the air basin are considered to contribute to excesses of the ozone standards that occur in other portions of the air basin or adjoining air basins. The Bay Area's Air Quality Plan, which constitutes the Bay Area's contribution to the California State Implementation Plan, has adopted a regionwide hydrocarbon reduction and nitrogen oxide maintenance strategy as the means of attaining and maintaining the federal ambient air quality standard for ozone.

3. According to the 1979 Emissions Inventory compiled by the BAAQMD, the Chevron Richmond Refinery is the largest stationary source of hydrocarbons and the third largest stationary source of nitrogen oxide emissions in the Bay Area. Even though the federal ozone standard may not be exceeded in the area immediately adjacent to the Chevron refinery, emissions from the refinery contribute to the ozone nonattainment problems in other portions of the Bay Area as well as the adjoining Sacramento air basin. EPA recognizes the regional impact of emissions on air quality through its requirement for ozone modeling 15–40 kilometers from urbanized areas (see 46 Federal Register 7192 of "State Implementation Plans; Approval of 1982 Ozone and Carbon Monoxide Plan Revisions for Areas Needing an Attainment Date Extension; and Approved Ozone Modeling Techniques; Final Policy and Proposed Rule-Making," 46 Federal Register 7182, January 22, 1981).

4. I am familiar with the BAAQMD's new source review rule and have participated in numerous workshops and hearings surrounding its development during the last three years. I have also reviewed the application of these rules, on a case-by-case basis, to individual projects and have read the declarations of Milton Feldstein and Robert Proctor in this case.

5. BAAQMD rules do not, in practice, require that the modification or expansion of an existing stationary source provide for greater-than-even emission offsets or accomplish a net reduction in the area's pollution. In practice, the requirement for greater-than-even offsets applies only to pollution from entirely new sources of air pollution which are not associated with any existing sources.

6. As far as the offset requirement is concerned, the definition of a source used by the BAAQMD to determine whether greater-than-even offsets are needed is, and has been, the "plantwide" definition adopted by the EPA on October 14, 1981. The "dual" definition which was required by EPA prior to October 14, 1981, was never used by the BAAQMD to require greater-than-even offsets.

7. According to section 2-2-203 of BAAQMD regulations (see page 2-2-6 of Exhibit #1 attached hereto) greater-than-even offsets pursuant to section 2-2-304 (see page 2-2-7, Exhibit #1) are not required unless the "cumulative increases" of hydrocarbon, particulate, sulfur oxide or carbon monoxide exceed 250 pounds per day or 550 pounds per day for nitrogen oxides. "cumulative increases" are calculated pursuant to section 2-2-203 (see page 2-2-4, Exhibit #1). This procedure yields a figure that is the difference between emission increases and decreases "during the preceding five years or since December 20, 1977, whichever period is shorter. . . ." Until this difference exceeds 250 pounds per day (or 550 pounds per day for nitrogen oxides) the offset requirement of section 2-2-304 does not come into play even though the absolute increases from the proposed modification exceed the cutoff level.

8. In effect, each stationary source in the BAAQMD is allowed to be modified and increase its net emissions by 250 pounds per day (or 550 pounds per day of nitrogen oxides) without providing offsets. Furthermore, because of the 5 year sunset clause used in the determination of cumulative increases, BAAQMD rules allow emissions at existing stationary sources to increase by these quantities due to modifications every five years without the need for offsets. When this potential for continual, incremental increases is multiplied times the thousands of sources of air pollution in the Bay Area the opportunity for significant adverse impacts on air quality is substantial.

9. A simple example will serve to illustrate the application of the BAAQMD's rules to a particular project. Let us assume that an oil company wishes to modify an existing oil refinery in the Bay Area. Let us also assume that the increased hydrocarbon emissions associated with this modification amount to 1000 pounds per day. As long as the project applicant is also able to decrease emissions at its existing refinery by at least 750 pounds per day, it will not have to offset the remaining increased load to the atmosphere, which can amount to as much as 250 pounds per day. According to District

rules, five years later the process could be repeated and an additional 250 pounds per day of hydrocarbons could be added to the atmosphere.

10. In contrast, if an oil company that did not operate a refinery in the Bay Area wanted to build a project that would emit 1000 pounds per day of hydrocarbons, it would be required to find 1200 pounds of hydrocarbon reductions, thus providing a 200-pound net reduction in Bay Area emissions. In five years, however, that facility too could increase its emissions by an additional 250 pounds per day, thus erasing the benefit it had previously provided.

11. Most permit activity for major sources in the Bay Area and nationwide involves modifications at existing industrial operations rather than the creation of entirely new operations. Since December, 1977, there has been only one construction permit issued for an entirely new major source in the Bay Area. In contrast, during that same time span, 46 construction permits for major modifications to existing major sources have been issued. According to EPA reports of offset activity, a similar trend is seen nationwide. (See, for example, USEPA's "Emission Offsets, Banking and Trading Update—February, 1980.")

11b. Thus, the use of a "plantwide" definition of source will greatly reduce the number of new sources that are actually subject to any of the Clean Air Act requirements associated with the granting of a permit to a new source. In the Bay Area, which has an ozone nonattainment plan that predicts a hydrocarbon reduction of 32 tons per day from new source review, a "plantwide" definition of source seriously undermines the ability of new source review to provide any reductions at all, let alone the 32 tons per day that have been promised.

11c. Individual states or air districts cannot be relied upon to use the "dual" definition even in the face of their continuing inability to meet ambient air quality standards. For example, at its December 16, 1981, meeting, the BAAQMD Board of Directors considered a CBE proposal to adopt a policy of greater-than-even offsets for modifications to existing sources.

Board Member Rod [sic] Diridon explained his vote against such a policy when he said:

> The action [CBE's proposal] would tend to put local industry potentially at a competitive disadvantage to some other areas of the nation and possibly in California. That may or may not be a significant impact, but it's a fact that must be considered. (Transcribed from the BAAQMD tape of the hearing.)

In spite of the fact that the measures contained within the Bay Area's Air Quality Plan no longer predict attainment of the federal ambient air quality standard for ozone, the BAAQMD Board, which is reputed to be a very environmentally conscious body, failed to approve CBE's proposal for greater-than-even offsets.

12. The question of "When is a source not a source?" is not just an abstract one. There are concrete examples. I have reviewed the BAAQMD's permit files on Chevron Oil Company's application for an Authority to Construct its proposed Richmond Lube Oil Project (#27797) and submitted comments to the BAAQMD on its preliminary decision to issue Chevron an Authority to Construct for this project. (See Exhibit #2 attached hereto.) The District's analysis and proposed permit (see Exhibit #3 attached hereto) provide concrete examples of the adverse air quality impacts associated with a "plant-wide" source definition.

13. Based upon my review of the materials contained within the Chevron permit file the preliminary decision of the BAAQMD will not require that the emissions from the modified refinery are less than those during the refinery's baseline period. The permit evaluation itself states that the refinery emissions will be limited to 'no net increase.' (See section C., page 3, Exhibit #3.) Were the "dual" definition of source to be applied to the proposed modification, there would be a net decrease of emissions from the project rather than merely maintaining emissions at current levels. Looking at hydrocarbons, for example, and assuming 1.2 pounds of reductions for every pound of increased emissions to the air basin, emissions would have to be reduced by 43.8 tons per

year. (Based upon 50.05 pounds per hour of hydrocarbon increases. See Table #1, page 3, Exhibit #3 "Increases from Project.")

14. Instead, notwithstanding the declarations of Milton Feldstein and Robert Proctor, no decreases are required. As originally proposed on November 10, 1981, in the BAAQMD's preliminary permit decision, there would be a "cumulative net" decrease of emissions due to the project. (See Table #1, page 3, Exhibit #3, "Cumulative Net Change.") However, these "decreases" do not take into account potential increases elsewhere in the refinery due to the processing of more crude oil. (See footnote #2 to Table #1, page 3, Exhibit #3.)

15. In addition, as noted in paragraph #7 above, these cumulative changes are not necessarily permanent reductions in emissions. For the next five years they can be applied as credit towards future increases in order to avoid providing greater-than-even offsets.

16. In fact, this has happened already. Chevron has requested that its allowable emission limits in the proposed permit be increased to include their cumulative emission balance. (See Exhibit #4 attached hereto.) Nearly all of the adjustments requested by Chevron in that letter are from the "Cumulative Net Change" found in Table #1, page 3, Exhibit #3. Looking at VOC (hydrocarbon) emissions for example: 18.22 pounds per hour = 79.8 tons per year compared with Chevron's request for an 81.4 ton per year adjustment.

17. The District responded to Chevron's request by increasing its allowable emissions by the requested values. (See Exhibit #5 attached hereto which was given to me by the BAAQMD permit engineers evaluating the project.)

18. Moreover, while "the 'bubble' concept" may require "that the modified facility taken as a whole will emit no more after the modification than it did before. . . ." (See declaration of Milton Feldstein pp 3–4.) the new source review rule does not appear to do so on its face as was discussed above in paragraphs 7 and 8. In fact, Chevron has attempted to determine its emission limits in a fashion that would allow its

monthly emission limits to increase above baseline levels by the maximum allowable "cumulative increase" that still avoids the requirement for greater-than-even offsets. (See Attachment II to Exhibit #6 attached hereto. Marginal notes found on Exhibit #6 apparently belong to the reviewing engineer, Swanson, and are presumable not on the original letter sent to Mr. Feldstein.)

19. It should also be remembered that the Bay Area is nonattainment for the federal ambient air quality standard for ozone which is a short-term (hourly) standard. The proposed Chevron permit does not contain limits on total short-term emissions from the refinery and associated wharf activities which are capable of protecting the ozone standard. Chevron must meet only monthly and annual emission limits from its refinery operation while wharf operations are limited only on an annual basis. Since emissions from the refinery and associated marine activities are not constant, monthly or annual emission limits do not guard against excessive peak emissions. Thus, under the proposed permit the short-term impact of Chevron's modified facility can exceed its historical impact in the baseline period.

20. The use of monthly and yearly emission averaging periods for plantwide emissions is a recent departure from previous District permits which used short-term emission limits and operational constraints on individual pieces of equipment.

21. Chevron asserts that "it would be substantially and irreparably harmed" due to a stay in this case even if it were only for a week or two. (See Declaration of Robert Proctor, page 5, paragraphs 9 and 10.) The credibility of such assertions is diminished by the fact that Chevron itself has injected additional delays into the permit proceedings at the BAAQMD.

22. In early December, after Chevron's application had been deemed complete for over three months and after the BAAQMD had finished its analysis of the application and issued its preliminary decision, Chevron proposed to submit a modified analysis of marine emissions which might affect baseline levels. This analysis will not be submitted to the

BAAQMD until January 4, 1982. (See Exhibit #7 attached hereto.)

23. The BAAQMD has agreed to accept Chevron's submittal for review and evaluation by its staff (See Exhibit #8 attached hereto.), a process I am told will take at least several weeks and could take several months. Subsequent to the BAAQMD's evaluation it intends to reopen the public comment period on the permit.

24. Moreover, Chevron has made assertions of economic hardship in the past. For example, in March 1981 they stated that, "The Project's economic attractiveness may diminish rapidly if start of construction is delayed beyond September 1981." (See Exhibit #9 attached hereto.) Even without the delays engendered by Chevron's new submittal to the BAAQMD construction is not scheduled to begin until March of 1982. Yet the project goes on. Given the highly profitable nature of the project we view such statements as aggressive corporate posturing intended to encourage environmental neglect and laissez-faire regulation on the part of public officials.

25. Chevron has reportedly gone so far in this regard as to use a form of economic blackmail, threatening to move the Project from Richmond to its refinery in Pascagoula, Mississippi, if it had difficulty securing the necessary permits (see Exhibit #10 attached hereto).

26. If a stay is not issued in this case, Chevron could conceivably initiate and complete construction of a facility which did not need to provide greater-than-even offsets. Identifying and providing these offsets after the plant begins operation could be a difficult, time-consuming and costly task. In any event, the public would suffer irreparable harm during the time between the initiation of the plant's operation and the achievement of the additional emission reductions.

27. In addition unless a stay is issued, Chevron and other industries previously affected by the construction moratorium will have little incentive to help implement control measures like vehicle inspection and maintenance, which are needed to improve air quality in California. One reason why California's

SIP has not yet been approved by the EPA is that the state legislature has failed to pass enabling legislation for vehicle inspection and maintenance. As a result, there has been a construction ban on major sources or air pollution in many areas of California. That ban has affected the proposed Chevron project. (See Exhibit #11 attached hereto.) But, if EPA does not now consider the Chevron project to be a source of pollution, then in EPA's eyes that ban does not apply. Thus, the new definition of a source threatens the improved air quality that would result from the timely implementation of a vehicle inspection and maintenance program to the extent that it enables Chevron and other previously affected industries to avoid the constraints of the construction ban and relax whatever efforts have been made in support of vehicle inspection and maintenance.

28. In the past, it would presumably have been in the best interests of Chevron and other affected industries to encourage the passage of inspection and maintenance legislation. However, industry's commitment to such a program was criticized at the December 16, 1981 meeting of the BAAQMD Board of Directors by Rod Diridon, a member of the Board and a Supervisor from Santa Clara County. Speaking to a room filled predominantly with industry representatives (including several from Chevron), Mr. Diridon said:

> There's a difference between giving lip-service to the process and getting up there and letting the legislators know that it's a life-or-death issue. . . . The point here is that if all of these organizations had been up there last year with the amount of pressure on the legislature that you have attempted to bring on this issue here today, SB 33 [a bill for establishing an inspection and maintenance program] would have passed last year. You have the potential for having a consortium in Sacramento that would guarantee the passage of SB 33, but instead we sit here fighting. . . . (Transcribed from BAAQMD tape of hearing)

To the extent that Chevron and other industries affected by the construction ban have not exerted strenuous efforts in support of the passage of an inspection and maintenance

program, they have sown the seeds of their own difficulties and cannot claim powerlessness over their own fate.

Executed this 5th day of January, 1982, in San Francisco, California.

Jeffrey Gabe

[EXHIBITS NO. 1–9 Omitted]

EXHIBIT #10

Second choice for Chevron refinery

By Andy Jokelson
Tribune Staff Writer

EL CERRITO—Chevron U.S.A. Tuesday formally announced that it hopes to begin construction by Oct. 1 on a $440-million replacement for its current Richmond plant that makes lubricating oil ingredients.

But if the subsidiary of Standard Oil Co. of California doesn't get the necessary government approvals for the project, Chevron U.S.A. president Kenneth Derr said the company would probably add such a plant to its Pascagoula, Miss. refinery.

The proposed new Richmond plant would replace 40-year-old facilities that are used to produce "base stocks" that go into the manufacture of lubricating oils.

Chevron is currently prevented from going ahead with the Richmond project by a Federal Environmental Protection Agency construction ban imposed on California because the state has not established a program for emission inspections of older vehicles.

Derr said the impasse could be resolved if the state legislature approves a vehicle inspection and maintenance program. Or the EPA could modify its interpretation of the federal Clean Air Act that led to the construction ban. Or Congress can change the law, Derr said.

"We are optimistic these issues can be resolved," he told the Council of Richmond Industries in a speech Tuesday.

The new Richmond project would also need a permit from the Bay Area Air Quality Management District.

Derr said, "We don't see any environmental problems in the construction of this facility." He said. "There should be no increase in air emissions. In fact, there should be a decrease."

Derr told a news conference before his speech that if Chevron doesn't get necessary permits soon for the Richmond site, "we may have to stop work" on the project. The company has already spent $5 million planning the project.

He added, "if we can't do it in Richmond, I would think we would do it in Mississippi."

Chevron estimates the project would create about 1,200 construction jobs and about 50 permanent new jobs at the refinery. The company hopes to have the new plant operating in 1984.

From East Bay Today
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Nos. 82-1005, 82-1247, 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A., INC.,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS

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April 29, 1983

QUESTION PRESENTED

Whether the court of appeals, ruling on provisions of the Clean Air Act for meeting the health-based National Ambient Air Quality Standards where they are now violated, correctly held that the Administrator of the Environmental Protection Agency exceeded her authority when she redefined the term "source" to mean whole industrial plants only and thereby exempted from permit requirements the major industrial installations (such as boilers and blast furnaces) built within such plants.

PARTIES TO THE PROCEEDING

The respondents are Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and American Lung Association of Northwestern Ohio, Inc. NRDC and CBE are national non-profit organizations with more than 43,000 and 24,000 members, respectively. The Association (formerly known as the Northwestern Ohio Lung Association) is a non-profit organization serving metropolitan Toledo, Ohio, and has more than 68,000 contributor/members. Other parties are identified by the petitions for certiorari.

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CHEVRON U.S.A., INC.,
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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
CITIZENS FOR A BETTER ENVIRONMENT, INC.
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN OHIO, INC.
Respondents.

OPINION BELOW

The opinion of the court of appeals in *Natural Resources Defense Council, Inc., et al.*, v. *Gorsuch* is reported at 685 F.2d 718. It is reproduced in App. A to the petition of Chevron U.S.A. (No. 82-1005). The orders denying petitions for rehearing and suggestions for rehearing *en banc* are reprinted in App. B to the Chevron petition.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (Supp. IV, 1983) are reproduced in App. 1a-10a to the petition of American Iron and Steel Institute, *et al.* (No. 82-1247). Pertinent portions of the implementing regulations, 40 C.F.R. § 51.18(j), are reproduced in App. 32a-33a of the AISI petition.

STATEMENT OF THE CASE

The petitions for certiorari give no good reason for this Court to review the decision of the court of appeals. The lower court decision creates no conflicts among the circuits, with decisions of this Court, or even within the D.C. Circuit. The decision raises no constitutional question, no issue of general principles for statutory construction, and no generally applicable question of administrative law. The only issue presented in the petitions is the construction of one provision of a federal statute, the Clean Air Act as amended in 1977,[1] and on this issue the lower court reached the correct decision. Moreover, Congress is presently amending the Clean Air Act as a whole and shows every sign of explicitly endorsing the lower court decision. In these circumstances, Supreme Court review is unnecessary and unwarranted.

This case concerns the scope of one provision of the Clean Air Act. Specifically, the case concerns the statutory obligations of new and modified "major stationary sources" of pollution built in the heavily polluted areas of the United States that do not meet minimum federal health standards (the national ambient air quality standards).[2] Under Sections 110(a)(2)(D), 172(b)(6), and 173 of the Clean Air Act,[3] new and modified sources whose emissions exceed specified levels must undergo careful review and meet three pollution-reducing requirements in order to obtain a permit for construction and operation. This permit process is known as "new source review."

To obtain a permit, the owner or operator of the prospective source must: (1) use state-of-the-art pollution controls, (2) demonstrate compliance with all emission limits that apply to

[1] 42 U.S.C. §§ 7401 *et seq.* (Supp. IV.) All U.S. Code citations are to Supp. IV.

[2] The standards are established under Sections 108 and 109 of the Act, 42 U.S.C. §§ 7408-09.

[3] 42 U.S.C. §§ 7410(a)(2)(D), 7502(b)(6), 7503.

his existing sources, and (3) secure a substantial net reduction in overall emissions (usually through a greater-than-even emissions "offset").[4] These three conditions assure that new industrial growth reduces pollution rather than increases it, and contributes to, rather than hinders, rapid attainment of the health standards.

At issue in this case is the scope of the term "major stationary source": Which industrial projects are subject to new source review and the substantive pollution control requirements applied therein? All parties in this case agree that if a company wishes to build a major new industrial project—e.g., a large boiler, blast furnace, or petroleum storage tank—at a *new site* in an area with unhealthy air, that project is a "major stationary source" subject to new source review under Sections 110(a)(2)(D), 172(b)(6), and 173. The question in this case is whether the Clean Air Act treats this industrial project any differently if it happens to be built not at a new site, but within a *pre-existing plant.*

The statute mandates *identical* treatment for such projects, regardless whether they happen to be constructed at new sites or within existing plants. In areas with unhealthy air, both of these projects are "sources" subject to the Act's new source review requirements.

This is what the Environmental Protection Agency's regulations provided through October 1981.[5] At that time, however, former EPA Administrator Anne Gorsuch changed the definition of the term "source" so that it thenceforth applied only to entire industrial plants.[6] As redefined, the term no longer covered major individual units (such as boilers, blast furnaces, or storage tanks) located within plants. The stated purpose of this definitional change was to exempt the bulk of such units from new source review. Indeed, the exemption allowed more

[4] See pp. 12-14, *infra.*

[5] See 40 C.F.R. §§ 51.18(j)(1), 54.24(f), at 45 Fed. Reg. 52,743-44, 52,746 (Aug. 7, 1980).

[6] 46 Fed. Reg. 50,766, 50,771 (1981), amending 40 C.F.R. §§ 51.18(j)(1), 54.24(f). (AISI Pet. at 31a-33a.)

than *90 percent* of the projects Congress intended to be covered to evade the permit requirements.[7]

Under these rules, the builder of a major unit at a pre-existing plant could evade new source review and the pollution-reducing conditions for permits if he secured an intra-plant pollution reduction. Contrary to repeated misstatements by one of the petitioners,[8] the intra-plant emission reduction *did not have to be as large as the emission increase from the new unit.* Rather, the rules typically allowed plant-wide pollution *increases* of 25 to 40 tons per year, and in some instances as much as 100 tons per year, each time a major project was built.[9]

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[7] The reason is that areas with unhealthy air typically are already heavily developed, and nearly all major industrial growth takes place at existing plant sites. For example, between December 1977 and January 1982 there were 46 major additions or modifications to major existing plants in the San Francisco Bay Area, and only one new major source was constructed at a virgin site. Declaration of Jeff Gabe, Research Director, Citizens for a Better Environment (San Francisco), ¶ 11 (Jan. 1982) (documents filed with the court of appeals). Nationwide, EPA recorded more than 590 major additions or modifications to existing plants in nonattainment areas between 1976 and 1980. In the same period, EPA recorded no more than 14 major projects built in such areas at wholly new sites. EPA, "Emissions Offsets, Banking, and Trading Update" (Feb. 1980).

[8] Petitioners American Iron and Steel Institute, *et al.*, (AISI) repeatedly make the erroneous claim that the intra-plant emission reduction must be as large as the increase it is "netting out." AISI mischaracterizes the EPA plant-wide definition as follows: "If 'source' is so defined, the owner or operator . . . can make a process or equipment change which results in an increase in pollutant emissions at one unit within the plant without becoming subject to the permit process . . . if he counters that increase with an *equal or greater* contemporaneous decrease in emissions elsewhere in the plant." AISI Pet. at 5 (emphasis added). See also *Id.* at 7 and n. 17. This, as demonstrated in the following text and note, is simply not so.

[9] The rules deemed insignificant and treated as zero net plant-wide pollution increases up to the following amounts:

Carbon monoxide:	100 tons per year (tpy)
Nitrogen dioxide:	40 tpy
Sulfur dioxide:	40 tpy
Particulate matter:	25 tpy
Ozone:	40 tpy of volatile organic compounds (hydrocarbons)
Lead:	0.6 tpy

40 C.F.R. §§ 51.18(j)(1)(xiii), 52.24(f)(13).

(footnote continues)

On August 17, 1982, a panel of the lower court held EPA's plant-wide "source" definition contrary to law. (Chev. App. A.) The full court denied suggestions for rehearing *en banc* by a 6-1 vote. (Chev. App. B.)

REASONS FOR DENYING THE PETITIONS

None of the factors enumerated in Rule 17 as weighing in favor of granting petitions for certiorari is present in this case. As shown in Part I of this argument, the case has created no conflict among the circuits, with Supreme court decisions, or even within the D.C. Circuit. The case involves no constitutional questions. It raises no generally applicable issues of statutory construction or administrative law. The only issue involved is construction of a single provision of the Clean Air Act, an issue which—given the demands on the Court's limited resources—is not sufficiently important for review. Moreover, as demonstrated in Part II, on this issue the lower court reached the correct result.

I. THE LOWER COURT DECISION CREATES NO CONFLICT AMONG CASES, RAISES NO CONSTITUTIONAL ISSUES, AND PRESENTS NO GENERALLY APPLICABLE QUESTIONS OF STATUTORY CONSTRUCTION OR ADMINISTRATIVE LAW

A. No Conflict Among Cases

1. Among the Circuits

This case presents no conflict among the circuits. In fact, both the Fourth and Ninth Circuits have addressed the

(footnote continued)

Consider, for example, a new storage tank being built at a refinery, which would emit 200 tons per year of hydrocarbons. For hydrocarbons, the EPA rules treated any plant-wide increase up to 40 tons per year as though it were *zero*. To avoid new source review, the owner of the refinery would need to make an intra-plant reduction of just over 160 tons per year. Each time such a project was built, total hydrocarbon pollution in the air could increase by up to 40 tons per year.

"source" definition question and come to the same result as the District of Columbia Circuit.[10] Supreme Court review, therefore, is unnecessary.[11]

2. With Supreme Court Decisions

Petitioners EPA and AISI argue that the lower court decision conflicts with *Train* v. *Natural Resources Defense Council,* 421 U.S. 60 (1975). They contend that *Train* gives the states freedom to choose any path to attainment of the health standards that they wish, regardless of specific minimum requirements of the Clean Air Act. EPA Pet. at 13; AISI Pet. at 12. *Train,* however, does not go so far. That decision recognizes that in addition to demonstrating timely attainment of the health standards, the states' programs also must "satisf[y] the standards of § 110(a)(2)." 421 U.S. at 79.[12] The

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[10] Potomac Electric Power Co. v. EPA, 650 F.2d 509, 516-18 (4th Cir. 1981); Sierra Pacific Power Co. v. EPA, 647 F.2d 60, 66-67 (9th Cir. 1981). In both cases, petitioners sought unsuccessfully to block the application of new source performance standards (set under Section 111 of the Act, 42 U.S.C. § 7411) to new boilers being added to existing electric generating plants, by invoking a plant-wide "source" definition. Both courts rejected these claims. Although both courts found their decisions controlled by the D.C. Circuit's decision in ASARCO v. EPA, 578 F.2d 319 (D.C. Cir. 1978) (See note 14, *infra*), neither court expressed any reservations with the D.C. Circuit's reasoning.

[11] The petitioners complain that conflict among the circuits is impossible because the Clean Air Act assigns review of nationally applicable clean air regulations, such as those at issue in this case, exclusively to the District of Columbia Circuit Court of Appeals. Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Congress did this, however, explicitly to serve the same goal served by Supreme Court review of conflicts among circuits: national uniformity of law. See S. Rep. No. 127, 91st Cong., 2d Sess. 41 (1970), reprinted in 1 *Legislative History of the Clean Air Act Amendments of 1970* at 441 (Senate Comm. on Public Works, Ser. 93-18, 1974):

> Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court of Appeals for the District of Columbia.

Petitioners assert they are deprived of opportunities for further litigation. Rather, the issue is now settled and framed for congressional review. As shown in Part III, Congress appears ready to endorse the lower court decision, not reject it.

[12] See also Union Electric Co. v. EPA, 427 U.S. 246, 250 (1976).

states' latitude to choose the "mix of emission limitations," *id.*, does not include authority to waive specific requirements of Section 110(a)(2).[13]

By virtue of subparagraph 110(a)(2)(D), as amended in 1977, the minimum requirements of Section 110(a)(2) include the new source review provisions of Sections 172(b)(6) and 173. As shown in Part II, these provisions rule out the plant-wide definition of "source." While the states retain control over many particulars of their SIPs under the 1977 nonattainment amendments, this is one requirement they may not waive. Because new source review is a requirement of Section 110(a)(2), there is no conflict with *Train*.

3. Within the D.C. Circuit

Petitioners Chevron and AISI strive to paint a picture of conflict within the decisions of the D.C. Circuit. Despite the petitioners' efforts to confuse, the decisions of the court of appeals are fully consistent with one another.[14] The petitioners

[13] A SIP could not be approved if it lacked emission limitations, for example. Thus, SIPs which substituted excessively tall smokestacks (to disperse pollution rather than control it) in place of actual emission limitations could not be approved. See Natural Resources Defense Council v. EPA, 489 F.2d 390, 408-10 (5th Cir. 1974), *rev'd in part on other grounds sub nom.* Train v. NRDC, 421 U.S. 60 (1975). See also Big Rivers Electric Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1975) (same); Kennecott Copper Corp. v. EPA, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1975) (same).

[14] In ASARCO v. EPA, 578 F.2d 319 (D.C. Cir. 1978), the court held that the plant-wide definition was inconsistent with the pollution-reducing purpose of the Act's program for establishing new source performance standards (NSPS), 42 U.S.C. § 7411, because the plant-wide definition would allow new facilities to escape such standards and maintain the high pollution rates of old facilities. The court observed: "Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements." *Id.* at 329 n.40.

In Alabama Power Co. v. Costle, 636 F.2d 323, 401-02 (D.C. Cir. 1979), the court found the plant-wide definition acceptable under the Act's program for protecting areas with air quality *better* than the minimum national health standards (prevention of significant deterioration or "PSD"). Sections 160-169A, 42 U.S.C. §§ 7460-91. The reason for the different result was that the

(footnote continues)

pressed identical arguments in petitions for rehearing *en banc*, which the court of appeals voted 6-1 against. Intra-circuit conflicts, if they exist at all, are generally left to the circuit to settle by sitting *en banc*.[15]

In sum, there is no conflict among the circuits, with Supreme Court opinions, or within the D.C. Circuit requiring this Court's resolution.

B. No Constitutional Issue

The petitioners have tried to create the impression that important issues of federal-state relations are at stake.[16] The petitioners do not even argue, however, that Congress is in any way constitutionally barred from defining the scope of the term "source." They contend only that Congress did not do so. That is purely a statutory question. The court of appeals decided that the statute does determine the meaning of "source," and as shown in Part II, that decision was correct.

C. No Generally Applicable Questions of Rules for Statutory Construction or Principles of Administrative Law

The petitioners contend the court of appeals failed to defer to EPA's construction of the statute. EPA Pet. at 12; AISI Pet. at 15. This contention raises no significant issue of general importance. Rather, it asks the Court merely to review one application of the well-settled law on when deference is appropriate.

(footnote continued)

purpose of the PSD program is different from the purpose of the NSPS program. PSD's purpose is not to reduce pollution, but to meter limited increases in pollution allowed by law. The court reached this conclusion relying on legislative history specific to the PSD program. *Id.* Because of the difference between program purposes, the court of appeals both distinguished and reaffirmed *ASARCO*. *Id.* at 402.

The distinction drawn in the prior cases clearly points to the illegality of the plant-wide "source" definition in the nonattainment program. NRDC v. Gorsuch, 685 F.2d 718, 725-727 (D.C. Cir. 1982) (Chev. App. A-13 through A-18).

[15] Wisniewski v. United States, 353 U.S. 901, 902 (1957).

[16] See *e.g.*, EPA Pet. at 14.

While deference to an agency's interpretation of the law is common, the courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965). Deference to EPA's construction was not warranted in this case.

First, the law and legislative intent are definite on this issue. As shown in Part II, Congress explicitly intended new source review under Sections 110(a)(2)(D), 172(b)(6), and 173 to cover major industrial units built within existing plants, as well as such units built on their own. Second, the agency's interpretation was by no means long-standing or consistently held. The regulation in question dates only from 1981. For ten prior years, in the context of the program to meet the health standards where they are now violated, the term "source" covered the major units built within plants, not just whole plants.

Third, Congress has never given its blessing to EPA's 1981 plant-wide interpretation of the term "source." In fact, as elaborated in Part III, Congress is currently amending the Clean Air Act, and the key Senate Committee has explicitly endorsed the lower court decision.[17] Finally, no appeal to "agency expertise" can mask the obvious conflict between the pollution-reducing purposes of new source review in areas with unhealthy air and the pollution-*increasing* effect of EPA's plant-wide "source" definition.

Petitioner AISI also argues that the lower court applied an improper standard of review when it failed to defer to EPA's reversal of position on a factual assertion—a dubious claim that the congressionally-chosen pollution control requirements for new sources perversely harm air quality by retarding the replacement of old sources. AISI Pet. at 18. The issue of the standard for review of agency reversals, however, is not

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[17] See p. 23, *infra*. See also the legislative history of the 1981 Clean Air Act amendments, the Steel Industry Compliance Extension Act, discussed at note 48, *infra*.

presented in this case. The reason is that the government twice *explicitly conceded* its factual assertion in the court below.[18] Since EPA has conceded the factual issue on which AISI's deference argument depends, AISI's argument is moot.[19]

The only remaining basis for granting certiorari would be the presence of an important question of federal law warranting decision by this Court. As demonstrated in Part II of this argument, however, this case presents only a run-of-the-mill statutory question of the type usually left to the courts of appeals. The lower court decision, moreover, was correct on the merits, and has drawn congressional endorsement. Especially in the absence of any other consideration favoring certiorari, this question does not merit review.

II. THE LOWER COURT DECISION WAS CORRECT

The petitions for certiorari are based fundamentally on the false premise that the Clean Air Act does not define the meaning of the term "source" for the purposes of the program to meet the health standards. The Act, however, *does* determine the meaning of the term "source" and the scope of the permit provisions in the nonattainment areas. The 1977 amendments to the Act and their legislative history show plainly that major new and modified industrial units are subject to new source review, regardless whether located on their own or within plants. This result is compelled as well by the pollution-reducing purpose of new source review in the nonattainment areas. As a result, EPA has *no* discretion to give "source" a plant-wide definition, or to approve state regulations with plant-wide definitions. The lower court decision, therefore, was correct.

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[18] In its memorandum opposing a stay pending review (at 12) and in its brief on the merits (at 12), the Agency said: "EPA did not rely on this [the alleged effect on modernizations] as a basis for its decision." Rather, EPA sought to defend its decision on purely legal grounds.

The government's concession may have been motivated by the fact that the entire record support for this proposition consisted of two two-page, conclusory letters from industrial commentors. See pp. 65-68 of the Joint Appendix below.

[19] An agency's decision can be defended only on grounds the agency asserted. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

A. The 1977 "Nonattainment" Amendments

The permit provisions of Sections 110(a)(2)(D), 172(b)(6), and 173 are part of the expanded program enacted in 1977 for meeting the national health standards (the primary national ambient air quality standards). Congress adopted this program in reaction to shortcomings of the Clean Air Act of 1970. Although significant progress was made under the 1970 Act, its requirements proved insufficient to protect public health. Nearly all the State Implementation Plans (SIPs)—the state pollution control programs required to be adopted under the 1970 Act[20]—projected that the health standards would be met by the original statutory deadline—mid-1975.[21] When the deadline passed, however, areas of the country containing more than two-thirds of the U.S. population still suffered air pollution in violation of one or more of the health standards.[22]

In 1977 Congress addressed the problems of these "nonattainment" areas with amendments to Section 110 and the addition of Sections 171-178.[23] Congress gave the states more time to meet the health standards, but also demanded greater efforts from them. The amendments extended the deadlines for attainment; the standards now must be met by the end of 1982 or (for some areas with special problems meeting standards for two of the pollutants) the end of 1987.[24] The amendments also called for each state to revise its SIP and incorporate into it a set of more specific and stringent measures

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[20] Pub. L. No. 91-604 § 110, 84 Stat. 1680. (Citations to provisions subsequently amended are given to Statutes at Large.)

[21] Section 110(a)(2)(A), 84 Stat. 1680. Under certain circumstances, a two-year extension could be granted. *Id.* § 110(e), 84 Stat. 1682.

[22] Report of the National Commission on Air Quality, pp. 3.3-20 through 3.3-33 (Preliminary Staff Draft, Jan. 15, 1981) (The Commission was established in 1977 under Section 323 of the Clean Air Act, 42 U.S.C. § 7623, to report on progress under the Act.)

[23] Pub. L. No. 95-95, §§ 108, 129, 91 Stat. 693-97, 745-50, codified at 42 U.S.C. §§ 7410, 7501-08.

[24] Section 172(a), 42 U.S.C. § 7502(a).

than those required by the 1970 Act.[25] Most important for this case, the SIP must contain an expanded permit program for new and modified "major stationary sources." Sections 110(a)(2)(D), 172(b)(6), 173, 42 U.S.C. §§ 7410(a)(2)(D), 7502(b)(6), 7503.

Under this permit program, the state may issue a permit for construction and operation only if the following conditions are met:

> (1) the permitting agency determines that—
>
> > (A) by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress (as defined in section 171); or
> >
> > (B) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified stationary sources under section 172(b);
>
> (2) the proposed source is required to comply with the lowest achievable emission rate; and

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[25] Where a promise to meet the health standards as late as the last day before the deadline was acceptable under the 1970 Clean Air Act, the SIP now must also demonstrate incremental improvement in the interim years ("reasonable further progress"), Section 172(b)(3). The new plan must incorporate upgraded pollution controls for existing sources ("reasonably available control technology"). *Id.*

> (3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this Act....

Section 173(1)-(3). Paragraph (1)(A) requires the owner of the major source to secure an emissions "offset." The "offset" must exceed the emissions of the new source by an amount sufficient to constitute reasonable further progress towards attainment.[26] Paragraph (2) requires use of state-of-the-art emission control techniques.[27] Paragraph (3) requires that the source owner demonstrate that its existing facilities are subject to and in compliance (or on schedules for compliance) with pollution limits.

Paragraph (1)(B) allows a waiver of the "offset" requirement if the state, pursuant to Section 172(b)(5), has adopted a SIP containing sufficient extra emission reductions from existing sources, beyond those needed for marginal attainment and

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[26] "Reasonable further progress" is defined as annual incremental progress towards the standards in the years before the deadlines. Section 171(1), 42 U.S.C. §7501(1). This requirement is intended to keep states from deferring all pollution control measures until the last moment before the deadlines.

[27] The proposed source must meet the "lowest achievable emission rate" (LAER). Section 173(2), 42 U.S.C. §7503(2). LAER is defined as equal to the lowest pollution rate actually being achieved by an existing source of the same type, or as equal to the lowest rate required of such a source by any state, whichever is lower. Section 171(3), 42 U.S.C. §7501(3). The legislative history indicates that the states and EPA may consider the cost of controls when determining LAER, but in view of the health interests at stake, must give cost less weight than when setting other standards (e.g., the new source performance standards established under Section 111 of the Act, 42 U.S.C. §7411.) See H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (1977), reprinted in 4 *Legislative History of the Clean Air Act Amendments of 1977* at 2682 (Senate Committee on Environment and Public Works, Ser. No. 95-16, 1978) (hereinafter cited as *Leg. Hist.*).

reasonable further progress, to provide a "growth allowance." Under no circumstances, however, does Section 173 let a state waive the technology or self-enforcement requirements. These must be met by major new and modified sources even in a nonattainment area whose SIP has a growth allowance.

As an incentive for adopting and implementing the upgraded State Implementation Plans contemplated by the 1977 amendments, Section 110(a)(2)(I) provides that no major stationary source may be constructed or modified in the nonattainment areas of states which have not revised their plans in accordance with these provisions by mid-1979. 42 U.S.C. § 7410(a)(2)(I). Once the SIP is approved by EPA, permits may not be issued for construction of major sources unless the state is carrying out the plan. Section 173(a)(4), 42 U.S.C. § 7503(a)(4). In this way, Congress gave the states and private industry a common interest in taking the measures necessary to protect public health.

A "*major* stationary source" is "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." Section 302(j), 42 U.S.C. § 7602(j). A major modification is any physical or operational change in an existing source which causes its emissions to increase by "significant" amounts—typically 25-40 per year—specified by regulation.[28]

The term "stationary source" itself is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3), 42 U.S.C. § 7411(a)(3).

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[28] "Modification" is defined as "any physical change, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by the source or results in emission of any air pollutant not previously emitted." Sections 111(a)(4), 171(4), 42 U.S.C. §§7411(a)(4), 7501(4). The "significant emission" levels were promulgated pursuant to Alabama Power Co. v. Costle, 636 F.2d 323, 399-400 (D.C. Cir. 1979). They are set out in note 9, *supra*.

The statutory text, the legislative history of the permit provisions, and the fundamental purpose of the provisions, definitively show that new source review in "nonattainment" areas applies equally to major industrial units being built within existing plants and major units being built on their own.

B. The Statutory Terms

The legislative intent is apparent in the statutory terms themselves, beginning with the statutory definition of "source." Section 111(a)(3) defines a "source" as "any building, structure, facility, or installation" which emits or may emit air pollution. A project which is any one of these four terms is a "source." These terms are not susceptible of a plant-wide construction. A "building" cannot be a combination of buildings. A "structure" cannot be a collection of structures. "Facility," as explained below,[29] was the term chosen by the 1976 and 1977 Senate bills, which unmistakeably intended new source review in nonattainment areas to cover the major projects within plants. "Installation," prior to the 1981 rules change, was defined by EPA itself as a major piece of process equipment.[30] EPA's subsequent attempt to define all four terms as only entire plants cannot be squared with the statutory language or intent, and was properly reversed by the court of appeals.

This conclusion is reinforced by Section 173. As explained above, Section 173(1)(B) allows a state to waive the greater-than-even "offset" requirement if it creates a growth allowance by requiring extra emission reductions from existing sources. Nothing, however, permits a state to waive the technology or self-enforcement requirements. There is no logical reason why Congress would have so sharply delineated the terms for waiving "offsets," and would have so clearly barred waiver of the other two requirements, if Congress had intended to let EPA eliminate *all three* conditions by changing the definition of a "source." The procedure for waiver of offsets makes sense

[29] See pp. 17-18, *infra*.

[30] See note 5, *supra*.

only if Congress understood "source" to include the major projects built within plants.[31]

C. Analysis of the Legislative History

The same conclusion follows from the legislative history. The permit provisions have their origin in 1976 legislation to amend the Clean Air Act. This bill proceeded as far as Conference Committee agreement, but failed to become law because of a post-conference filibuster on an unrelated issue. To tide over until Congress could complete action the following year, in December 1976 EPA adopted an interpretive ruling based on these provisions. In 1977, amalgamating the 1976 bill and the EPA ruling, Congress enacted Section 173. From

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[31] The limited opportunity to waive offsets, but not the technology or self-enforcement conditions, explains the real meaning of the petitioners' principal legislative history citation. The House Report states that the 1977 nonattainment provisions have two main purposes:

> (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow states greater flexibility for the former purpose that EPA's present interpretative regulations afford.

H.R. Rep. 294, 95th Cong., 1st Sess. 211, 4 *Leg. Hist.* at 2678. From this passage the petitioners infer that EPA has the freedom to adopt a plant-wide definition of "source." (EPA Pet. at 15; AISI Pet. at 13-14; Chev. Pet. at 12.)

Their broad inference is incorrect, however. The pages of the Report which follow (211-14, 4 *Leg. Hist.* at 2678-81) plainly show that Congress had two specifics in mind when referring to "greater flexibility." First, Congress adopted the growth allowance alternative to offsets in Section 173(1)(B), an option which was not available under the EPA "offset ruling" referred to in the quotation. See p. 21, *infra*. Second, Congress altered the baseline for calculating emissions offsets under the interpretive ruling. Under EPA's ruling, a source owner or operator could take credit for an emission reduction, as an offset against new pollution, only to the extent pollution was reduced below "reasonably available control technology" levels. In these amendments, Congress changed the offset baseline for the period until revised nonattainment SIPs were adopted. Until then, the offset baseline was the emission level allowed by the SIP presently in effect. Section 129(a), codified as a note to 42 U.S.C. §7502. This had the effect of allowing more "room" for growth during the transition period while SIPs were being revised.

The cited passage can hardly be read as a general grant of discretion. It does not extend to changing the basic "source" definition.

beginning to end, the permit provisions applied to major new and modified units built within plants, and a plant-wide "source" definition was ruled out.

1. The 1976 Bill

The new source review and permit provisions were first introduced in the 1976 Senate bill. The 1976 Senate Report stated the problem which the bill sought to solve. Under the 1970 Act, in areas where the deadlines for meeting the health standards had passed unmet, *no further additions to polluting industries were allowed:*

> The Clean Air Act prohibits the addition of any emissions of an air pollutant in any air quality control region or portion thereof where an ambient air quality standard for that pollutant has not been attained.[32]

The Report noted, however, that the nonattainment areas include many places where economic growth and industrial development are highly desirable. "The most logical and economical place for industrial expansion to take place," the Report continued, "is often at existing plant sites, in the vicinity of present industrial development."[33]

To allow such growth to proceed, the Senate Committee adopted an exception from the general growth prohibition of the 1970 law, allowing the addition of new "facilities" at existing plant sites. The exception was narrow. It did not allow construction of new facilities at *new* sites in nonattainment areas under any circumstances. It did not even allow the addition of a new facility to an existing plant unless the new facility met pollution-reducing conditions (conditions which later grew into the state-of-the-art technology, self-enforcement, and greater-than-even offset requirements of the present Section 173).

Specifically, the Committee adopted Section 11 of S. 3219, which stated:

> No major emitting facility shall be constructed or modified in any air quality control region or

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[32] S. Rep. No. 717, 94th Cong., 2d Sess. 42 (1976), 6 *Leg. Hist.*, at 4743.
[33] *Id.*

> portion thereof in which any national ambient air quality standard is exceeded, if such facility will emit air pollutants subject to such standard so as to prevent the attainment or maintenance of such standard, except that *a facility proposed for construction or modification at an existing site or plant* owned or operated by the owner or operator of such facility may be constructed or modified *if* the owner or operator demonstrates to the satisfaction of the state that (A) the proposed facility will comply with the best available technology ... applicable to such proposed facility before the proposed facility begins operation, (B) all existing sources owned or controlled by the owner or operator of the proposed facility are in compliance with an approved schedule and timetable for compliance ... (C) the total cumulative emissions from the facility location and the proposed facilities will at no time increase, [and] (D) the total allowable emissions from all existing and proposed sources at the proposed facility location will be sufficiently less than the total allowable emissions from the existing sources ... so as to represent reasonable further progress toward attainment of the applicable national ambient air quality standard ....[34]

Contrary to EPA's plant-wide "source" definition, this bill distinguished between "sources" and "plants" and permitted the addition of major new projects at existing plants *only* if the three technology, self-enforcement, and offset conditions were met.

The Senate provision was adopted unchanged by the Conference Committee.[35] Final enactment in 1976, however, was prevented by a filibuster on an unrelated issue (protection of areas with air quality better than the health standards).

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[34] Subparagraph (A) later became the "lowest achievable emission rate" requirement; subparagraph (B) became the compliance requirement; and subparagraphs (C) and (D) became the "offset" requirement. 6 *Leg. Hist.* at 4652-53 (emphasis added).

[35] S. 3219, §119, 5 *Leg. Hist.* at 4312.

2. The 1976 EPA Interpretive Ruling

Congress' failure to pass amendments in 1976 left EPA and the states in difficulty, because the statutory deadline for meeting the health standards had passed unmet in many places. As the 1976 Senate Report had observed, this meant no further new source construction was permitted in such areas. To avoid this result, after Congress adjourned EPA issued an interpretive ruling which permitted construction to continue in nonattainment areas on terms consistent with the 1976 bill's exception from the growth ban.[36] The "Offset Ruling" (as it has come to be known) permitted construction of a "major"[37] new and modified source in a nonattainment area only if the three conditions of the 1976 legislation were met: (1) compliance with the "lowest achievable emission rate," (2) certification that commonly owned or operated sources are in compliance (or on schedules for compliance) with applicable emission limits, and (3) achievement of a greater than one-for-one emissions "offset."[38] Under the Offset Ruling, just as under the 1976 bill, "sources" were individual major units, not whole plants.[39]

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[36] 41 Fed. Reg. 55,524 (Dec. 21, 1976).

[37] Defined as emissions of 100 tons per year of any pollutant, except carbon monoxide for which the threshold was 1000 tons. *Id.* at 55,528, col. 1.

[38] *Id.* at 55,528-29.

[39] This is evident from the preamble to the ruling, which notes that both "internal" and "external" emission reductions may be used to satisfy the offset condition. *Id.* at 55,526, cols. 2-3. (An "internal" offset is one from another source in the same plant; an "external" offset is one from another source at another site.) There would have been no need for discussion of internal offsets—indeed there would have been no such thing as an internal offset—unless what EPA meant by "source" was major industrial units (such as boilers and blast furnaces) rather than whole plants.

In addition, immediately after defining the amount of emissions which make a source "major," the text of the ruling states that:

> A proposed new source with an allowable emission rate exceeding the ["major"] amounts is considered a major source under this ruling, even though such a source may replace an existing source with the result that the net additional emissions are less than the ["major"] amounts.

Id. at 55,528, col. 1. This statement is not consistent with a plant-wide conception of "source," for whole plants are almost never replaced. Rather, replacements nearly always involve discrete units within plants.

3. The 1977 Amendments

In January 1977, Senator Muskie, the chief architect of the Clean Air Act, introduced S. 252, the new source review provisions which were identical to those of the Conference Committee bill of the year before.[40] The Senate Committee did not make any change in its decision of the year before that major new units added to existing plants in nonattainment areas could be built only if they met the above-described conditions. The Committee did address the question: "Should the exception be available only for expansion at existing sites, or also for construction of new facilities at new sites?"[41]

The bill adopted by the Senate Committee extended the exception to new facilities at new sites, not just to new facilities at existing sites. To accomplish this, the Committee used the term "major emitting facility" alone, dropping the limiting reference in the prior bill to "a facility proposed for construction or modification at an existing site or plant."[42] The Committee also began the transformation of conditions (A) through (D) of the 1976 bill to their present form in Section 173.

Introducing the bill on the Senate floor, Muskie made clear the limited nature of this change and the meaning of the term "major emitting facility." He said:

> This year the issue that drew the greatest attention during the working sessions of the committee was the issue of new emissions in areas exceeding standards. The provision contained in the bill reported by the committee last year dealt only with the the expansion of existing facilities in such areas.
>
> The committee this year determined that a broadening of that provision was necessary so that new sources, without any existing facilities in the area, could still enter the area and construct new

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[40] 5 *Leg. Hist.* at 3605-06.

[41] A Section-by-Section Analysis of S. 252 and S. 253 Clean Air Act Amendments, 5 *Leg. Hist.* at 3873.

[42] S. 252, §13 (as reported by the Committee), 3 *Leg. Hist.* at 632.

> facilities under carefully limited procedures and meeting stringent requirements. The committee adopted a provision which provides protection for air quality while at the same time allowing new sources to be constructed.[43]

The Committee provision was adopted by the full Senate.

The House of Representatives began by adopting the EPA Offset Ruling into law.[44] The House bill modified the EPA ruling in only one significant respect, by providing the means for a state to waive the "offset" requirement if it adopted a SIP with a growth allowance.[45] The bill made no change in the Offset Ruling's definition of "source."

The Conference Committee melded the two bills into the current statutory language.[46] At no point in the legislative process was any change even suggested in the determination that the projects subject to new source review and permitting include the major units added within existing plants.

EPA's 1981 plant-wide "source" definition directly contradicted this congressional decision. It exempted major units at existing plants from the three Section 173 conditions upon compliance with a single, much less restrictive condition: a *less-than-even* intra-plant offset which allowed total pollution to increase.

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[43] 3 *Leg. Hist.* at 711.

[44] H.R. 6161, §117 (adding §127(b)(2)), 4 *Leg. Hist.* at 2331-32. Citations are to the bill passed by the Committee. The permit provisions were adopted without change by the full House. 4 *Leg. Hist.* at 3216.

[45] *Id.*, §127(c)(5)(A), (d)(1), 4 *Leg. Hist.* at 2333, 2336-37. See p. 16, *supra*.

[46] The similarity of the House and Senate provisions was emphasized by Rep. Paul Rogers, chairman of the House subcommittee responsible for the bill, when introducing the Conference agreement to the full House. Under the subject heading "Nonattainment" Rogers began: "The House and Senate bills were very close on this issue to begin with." The ensuing description of points of difference and compromise did not mention the scope of new source review, because there were no differences there. 3 *Leg. Hist.* at 319.

The 1977 amendments also adopted the EPA "offset ruling" described above (p. 19, *supra*) for an interim period. Pub.L. 95-95, §129(a), codified as a note to 42 U.S.C. §7502.

D. Analysis of the Statutory Purpose

The statutory provisions and legislative history just surveyed make plain Congress' purpose in adopting the new source review provisions. Congress intended that the construction or modification of major sources in nonattainment areas should contribute to, rather than hinder, rapidly meeting the health standards. Growth in such areas was acceptable only under the three pollution-reducing conditions of Section 173. Congress expressly found it unacceptable for such growth to continue while making pollution worse.[47]

Relying on the evident purpose of these provisions, and observing the effects of the plant-wide "source" definition, the court of appeals found that definition contrary to law. The court stated:

> The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs [national ambient air quality standards].

685 F.2d 718, 726-27 (Chev. App. A-19) (footnote omitted). Because of this purpose, changing the definition of "source" in order "to shrink to relatively small size new source review in

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[47] Contesting the lower court's analysis of the statutory purpose, the government's petition for certiorari claims the nonattainment program's new source review requirement "is not a mandate for the maximum feasible reduction in emissions." EPA Pet. at 20. To the contrary, the 1977 House Report stated:

> [I]n light of the adverse air quality and health consequences of this new pollution [from new sources allowed despite continued health standard violations], the committee concluded that all feasible efforts to reduce or control this new pollution should be mandated.
>
> Futhermore, maximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth .... Finally, the technology-forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 215, 4 *Leg. Hist.* at 2682.

nonattainment areas[] is impermissible." *Id.* at 720 (Chev. App. A-4) (footnote omitted).

This basis of decision was itself correct. Moreover, it necessarily leads to the same conclusion as direct analysis of the statute and its legislative history. EPA has no discretion to adopt a plant-wide "source" definition, or to approve State Implementation Plans with such a definition. For these reasons, the lower court decision was correct.[48]

III. CONGRESS SHOWS EVERY SIGN OF ENDORSING THE LOWER COURT DECISION

An additional reason why Supreme Court review is unwarranted is that Congress is currently considering legislation to amend the Clean Air Act and can give a timely hearing to the

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[48] Congress reiterated the meaning its holds for the term "source" in 1981, with the passage of an amendment to the Clean Air Act extending certain compliance dates for the steel industry. The Steel Industry Compliance Extension Act, Pub. L. No. 97-23, 95 Stat. 139 (1981), allows steel companies more time for compliance with emission limits applicable to their existing facilities, provided the companies meet carefully drawn conditions relating to modernizing these facilities and protecting air quality in the interim. The House Report on the bill emphasized that in "nonattainment" areas:

> [T]he program to modernize facilities will also continue to include the application of lowest achievable emission rate technology (LAER) on the modernized facilities.

H.R. Rep. No.121, 97th Cong., 1st Sess. 12 (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 63. The Report then listed examples of the type of projects that would be subject to LAER and the other new source permitting requirements:

> It is anticipated that the industry will use the opportunity to modernize the American steel industry by building modern *continuous casters*, converting *open hearth shops* to *basic oxygen furnaces* or undertaking similar projects to improve the competitive posture of the industry.

Id. (emphasis added). Each of the types of projects mentioned is a unit within a plant, not a plant itself. Modernization of such an installation is the construction or modification of a "major stationary source" and is subject to the permit provisions. *Twice* in the proceedings below, EPA admitted that these passages "do indicate that Congress thought new source review would apply to facilities within a plant." EPA Memorandum in Opposition to a Stay at 16; EPA brief at 19.

petitioners' objections to the scope of new source review. The question in this case is purely a matter of what Congress deems proper. EPA, in fact, has asked Congress for an amendment to adopt the plant-wide "source" definition.[49]

Congress, however, shows every sign of rejecting the EPA request. In May 1982, before the lower court decision, the Senate Committee on Environment and Public Works adopted an amendment which reversed the EPA plant-wide "source" definition.[50] The Senate Report, written after the lower court decision, explicitly endorses it: "The court's decision . . . correctly interprets congressional intent. . . ."[51]

The identical bill, containing the same "source" amendment, has been reintroduced in this session by the Chairman of the Senate Committee, Senator Stafford.[52] Congress probably will complete action on Clean Air Act amendments before the Court could decide this case. This schedule, coupled with the fact that Congress appears well satisfied with the lower court decision, makes Supreme Court review unnecessary.

IV. FURTHER REVIEW WOULD UNNECESSARILY DELAY PUBLIC PROTECTION FROM RECOGNIZED HEALTH HAZARDS

The Clean Air Act, as noted above, sets an urgent schedule for meeting the health standards, the primary national ambient air quality standards. Most areas were to have met these standards by December 31, 1982, deadline. Although many areas succeeded, more than 100 areas of the country appear not

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[49] Statement of EPA Assistant Administrator Kathleen M. Bennett, quoted in the *New York Times*, Aug. 18, 1982, p. 1.

[50] The amendment adds a new paragraph to Section 171 defining a "major stationary source" to include "each discrete operation, unit, or other activity which produces or may produce emissions of one hundred tons or more per year" of a pollutant for which the area does not meet the health standard. S. 3041, § 114 (adding § 171(5)), reprinted in S. Rep. No. 666, 97th Cong., 2d Sess. 157 (1982).

[51] *Id.* at 49.

[52] S. 768, 129 Cong. Rec. S2583 (daily ed. Mar. 10, 1983). Of course, if the lower court decision is allowed to stand, the "source" amendment will not be necessary.

to have met the deadline.[53] For these areas, far from being able to relax, EPA and the states are now under special obligations to take action to protect public health.[54]

EPA's change of the "source" definition to let most major new and modified projects escape new source review was completely inconsistent with these obligations. In response to the redefinition, 31 states (or parts of states) have already adopted, or are in the process of adopting, the plant-wide definition. Many of the areas which failed to meet the standards by the 1982 deadline are in these states. These areas must be made to adopt the correct "source" definition, so that industrial growth in these areas will play its congressionally designated part in protecting public health from dangerous air pollution.[55]

Because of the petitions for certiorari, issuance of the lower court's mandate has been stayed. EPA has taken the position that until the mandate is issued, it will not take any step to correct its own regulations or the State Implementation Plans

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[53] Even those areas which have extensions for meeting the carbon monoxide and ozone standards until the end of 1987 have their work cut out for them. A substantial number of such areas will fail to meet the standards by the 1987 deadline unless they promptly adopt the proper "source" definition.

[54] When the Administrator determines that a State Implementation Plan "is substantially inadequate to achieve [any] national ambient air quality primary or secondary standard," he must notify the state. The state then must revise the plan to cure the inadequacy. Section 110(a)(2)(H)(ii), 42 U.S.C. § 7410(a)(2)(H)(ii). If the state does not do so within 60 days, EPA must promulgate, and if necessary implement, an adequate SIP. Section 110(c)(1)(C), 42 U.S.C. § 7410(c)(1)(C). The failure to meet the standards by the 1982 deadline triggered these obligations of the states and EPA.

[55] Instead of carrying out the process described in the preceding note, former EPA Administrator Gorsuch threatened these areas with a moratorium on the issuance of permits for major new and modified sources. See 48 Fed. Reg. 4972 (Feb. 3, 1983). This threat is based on a misconstruction of Sections 110(a)(2)(I) and 173(4), 42 U.S.C. §§ 7410(a)(2)(I), 7503(4).

These provisions prevent issuance of permits to major new or modified sources of pollutants for which an area has unhealthy air if the area (a) does not have or (b) is not carrying out an EPA-approved SIP. See p. 14, *supra*.

(footnote continues)

with plant-wide "source" definitions.[56] Review by this Court would probably take another year. In this period, dozens of major sources will be built or modified without securing the permit required by Section 173. The Court's review would lead it to the same result as the lower court. In these circumstances, review is unwarranted.

V. THE LOWER COURT DECISION CORRECTS AN ABUSE OF THE "BUBBLE" CONCEPT

One final matter requires discussion. Running throughout the Chevron petition is an implication that the lower court decision bars any use of the "bubble" concept under the Clean Air Act. This implication is wrong. The case below did no more than reverse *one misapplication* of the "bubble" concept which, as we have shown, permitted air pollution sources to avoid the emission control responsibilities Congress has assigned them.

Discussion of the "bubble" concept is often muddied by a misconception that the "bubble" is only one thing. In fact, there are many different applications of the concept. Some

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(footnote continued)

The moratorium does *not* apply, however, in areas which *have* approved SIPs, and which have been carrying them out in good faith. *See* Statement of Sen. Stafford, Chairman of the Environment and Public Works Committee (and attached letter and memorandum of law from Sens. Stafford and Randolph to the EPA Administrator), 128 Cong. Rec. S15250-53 (daily ed. Dec. 16, 1982). *See also* Congressional Research Service, "The Application of Nonattainment Area Sanctions Under the Clean Air Act" (Feb. 17, 1983).

The proposed application of the moratorium is of very doubtful legality. Even if it is promulgated by the new EPA Administrator, it will not likely be sustained by the courts of appeals. This Court does not review one action just because of the speculated consequences of a possible future action that may not even be taken, and that will be subject to judicial review if it is.

[56] This policy is set forth in a memorandum entitled "D.C. Circuit Ruling on *Natural Resources Defense Council* v. *Gorsuch*, No. 81-2208—Reinstatement of the 'dual definition' of 'source' for new and modified sources in nonattainment areas," from Robert Perry (Associate Administrator and General Counsel) and Kathleen Bennett (Assistant Administrator for Air, Noise, and Radiation), to Regional Administrators, *et al.* (Aug. 27, 1982), Appended to Respondent's Motion to Stay Issuance of the Mandate (Nov. 2, 1982) (on file with the court of appeals).

applications are consistent with the Clean Air Act's requirements and purposes. Others, however, undermine those requirements and purposes.

The "offset" requirement of Section 173(1)(A) falls in the former category. It is specifically authorized by law. It is a fundamental part of the program for achieving the Act's primary goal: healthful air quality. The "offset" requirement assures that each time a major new source is built, existing pollution is reduced by more than the new source adds.

The plant-wide "source" definition, by contrast, operates to exempt new sources from the "offset" requirement and the other statutory conditions on permits. It actually lets total plant-wide pollution *increase* each time such a project is built, because the intra-plant reduction in emissions does not have to be as great as the emissions increase from the new project. This use of the "bubble" concept contravenes both the letter and spirit of the Clean Air Act.

The lower court ruled the plant-wide "bubble" illegal for the nonattainment program. The court did not rule on any other application of the "bubble" concept.[57] Other types of "bubbles" will have to be evaluated individually, on their own merits. Some types undoubtedly will pass muster; others will not. These, however, are cases for the future.

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[57] The ARMCO "bubble" discussed by *Amicus* Mid-America Legal Foundation is another type of "bubble" which simply was not at issue in this case and is not affected in any way by the lower court's decision. The ARMCO "bubble" has no bearing on the plant-wide "bubble" involved in this case.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted,

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No. 82-1005

In the Supreme Court of the United States

OCTOBER TERM 1982

CHEVRON U.S.A. INC., a corporation,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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No. 82-1005

In the Supreme Court of the United States

October Term 1982

Chevron U.S.A. Inc., a corporation,
Petitioner,

vs.

Natural Resources Defense Council, Inc.,
Citizens For a Better Environment, Inc.,
Northwestern Ohio Lung Association, Inc.,
Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

Respondents avoid the crucial question whether the holding of the Court of Appeals -- that EPA has no authority to use the bubble concept in nonattainment areas -- conflicts with the prior decisions of that court. Respondents' only efforts to explain away that conflict are based upon the erroneous assertion that "difference between program purposes" (R.Br., pp. 7-8, n. 14) accounts

for the conflicting results. But the point is that the purpose of the non-attainment provisions involved here is the same as that of the provisions in Alabama Power, where the Court of Appeals approved EPA's use of the bubble concept (Pet., p. 8).

This Court should resolve this conflict. The suggestion by respondents that this is an ordinary "intra-circuit conflict" which should be left to the circuit is without merit: Respondents admit that review of clean air regulations is of national importance (R.Br., p. 6, n. 11). The fact that Congress has assigned these cases to the D.C. Circuit for initial consideration certainly does not immunize that Circuit's decisions from review by this Court. Review by this Court is essential to prevent further havoc in the national enforcement of the Clean Air Act.

There is likewise no basis for the suggestion that review is unnecessary because of the speculative possibility of

future Congressional action. Respondents ignore the dangerous precedents which would result if erroneous Court of Appeals' opinions were always left unreviewed because of the possibility of Congressional "review" of those opinions. Moreover, the fact is that Congress has not acted even though it has been considering revision of the Clean Air Act for more than two years.

Contrary to respondents' assertions (R.Br., pp. 24-26), review by this Court will not adversely affect public health. The existing EPA regulations allow a state to issue construction permits only if the state has demonstrated to EPA that its overall air quality plan for the state assures reasonable further progress toward meeting air quality standards (Pet., pp. 3, 13-14). Thus, the bubble concept may be used only as part of a state program which meets the goals and standards of the Clean Air Act. Moreover, under the EPA regulations in question, a project would be allowed to proceed only if any net,

cumulative emission increase from a plant is below the maximum levels which Congress has found to be acceptable[1] (Pet., pp. 3-4).

On the merits, respondents totally ignore the fact that the EPA regulations in question simply define "stationary source" using the precise definition in section 111(a)(3) of the Clean Air Act (Pet., p. 11). Respondents do not, and cannot, defend the holding of the Court of Appeals that EPA committed a per se violation of the Act by conforming the EPA definition to that in the statute.

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[1] Respondents misstate the EPA regulations in question (R.Br., pp. 4-5, n. 9). The regulations allow modifications only if the net cumulative emission increase is below de minimus levels (40 C.F.R., Part 51, Appx. S, ¶ II.A.6., 40 C.F.R. § 52.24(f)(6)). The suggestion that a refinery owner could build new storage tanks increasing hydrocarbon pollution by 40 tons each year is simply incorrect; the regulations would only allow a total 40 ton increase for the entire refinery over a five-year period.

It is also significant that respondents virtually ignore the construction moratorium in nonattainment areas; unless the decision below is reviewed, that moratorium will ban all plant expansions or modifications in which a proposed piece of equipment would increase emissions, even if the expansions or modifications would reduce emissions from the plant as a whole, employ state-of-the-art emission control techniques, and demonstrate existing facility compliance (R.Br., p. 13).

Respondents' need to engage in an extensive discussion of legislative history is a virtual concession that the Court of Appeals opinion, which attempted to establish a "bright line test" is

erroneous and confirms that plenary review by this Court is warranted.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING THE POSITION OF PETITIONER

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING THE POSITION OF PETITIONER

Mid-America Legal Foundation ("Mid-America") moves the Court for leave to file the accompanying Brief as amicus curiae in support of the captioned petition for a writ of certiorari, as well as the related petitions filed by Chevron U.S.A., Inc. in Docket No. 82-1005 and by American Iron and Steel Institute et al. in Docket No. 82-1247.

The Solicitor General, counsel to petitioner, has consented to this filing. His written consent is filed with the Clerk of the Court. Counsel to certain respondents have not consented, thereby necessitating this motion.

Mid-America was organized in 1975 to engage in legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in issues of a national scope that originate in or have a direct effect on the mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. Mid-America has an interest in this case because the region is one of the most important manufacturing areas of the Nation.

In the accompanying brief, Mid-America as amicus curiae presents data from the Harvard Business School case study of an air pollution control program utilizing the "bubble" concept at the Middletown, Ohio steel plant of Armco, Inc. In announcing the expected approval of the plan by former Administrator, Douglas M. Costle, EPA stated that, "Armco's 'bubble' dust control plan would eliminate 4,000 tons per year of

particulate as compared to 652 tons per year under existing regulations."

Amicus presents the empirical evidence and analysis set out in the Harvard study to advance two points in support of the petitions for a writ of certiorari.

First, there is no inconsistency between the "bubble" concept and either the language of the Clean Air Act, 42 U.S.C. § 7401 et seq. (the "Act") or the purpose of Congress in bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part D of the Act. In fact, as the Harvard study demonstrates, considerably greater improvement in air quality may be achieved with the bubble concept than without it.

Second, absent such inconsistency, the policy decision of the Administrator of the Environmental Protection Agency to approve state implementation plans which permit use of the bubble concept and otherwise meet the requirements of the Act, as reflected in the challenged regulation, must be sustained.

In the brief, Mid-America urges the Court to grant the petitions for a writ of certiorari because the

court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court and has done so in a way in conflict with Batterton v. Francis, 432 U.S. 416 (1977), and Train v. NRDC, 421 U.S. 60 (1975).

Accordingly, Mid-America requests leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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No. _____

IN THE
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Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
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BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING THE POSITION OF PETITIONER

INTEREST OF AMICUS

The interest of amicus is set out in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The court of appeals has invalidated regulations of the Environmental Protection Agency which allowed

the application of a "bubble" concept to new source review requirements in areas which have not attained the national ambient air quality standards under the Clean Air Act, 42 U.S.C. § 7401 et seq. (the "Act"). It did so by ruling that the "bubble" concept is incompatible with those provisions of the Act which have the purpose of improving rather than maintaining air quality. The court of appeals thereby decided an important federal question which has not been, but should be, settled by this Court and did so in a way in conflict with Batterton v. Francis, 432 U.S. 416 (1977), and Train v. NRDC, 421 U.S. 60 (1975).

First, there is no inconsistency between the "bubble" concept and either the language of the Act or the purpose of Congress in bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part D of the Act, 42 U.S.C. § 7501 et seq. In fact, as the Harvard Study presented herein demonstrates, considerably greater improvement in air quality may be achieved with the bubble concept than without it.

Second, absent such inconsistency, the policy judgment of the Administrator of the Environmental

Protection Agency, reflected in the challenged regulation, must be sustained. Contrary to the decision of the court of appeals in this case, ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978), did not hold otherwise and cannot be controlling here.

ARGUMENT

I. Use of the "bubble" concept is consistent with the improvement of air quality.

There is no incompatibility between the "bubble" concept and either the language of the Clean Air Act or the legislative purpose of bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part D of the Act. In fact, use of the "bubble" concept in nonattainment areas not only may achieve greater air quality improvement than the stack by stack approach, but may also speed up the achievement of clean air standards in nonattainment areas. This was demonstrated in the case study of an air pollution control program at the Middletown, Ohio steel plant of

Armco, Inc. which was prepared for class discussion at the Harvard Business School.[1]

> The Middletown plant site produced 3 million tons of steel yearly, covered 2,600 acres, employed roughly 7,000 people, and stockpiled (depending on the season) something on the order of 670,000 tons of raw materials. Its various operations were well monitored by the EPA. Even though measurements at only one of the monitoring stations on the periphery and in the vicinity of the plant exceeded the primary TSP ambient air standard of 75 ug/m^3 (micrograms per cubic meter, a measure of density), that single station resulted in the Middletown area's being designated a "nonattainment" area.

Harvard Study Part A, at 1 (exhibits and footnotes omitted).

To deal with Armco's problem and others like it, Congressional hearings and a White House conference were held. In addition, Anthony Solomon, Undersecretary of the Treasury for Monetary Affairs, chaired a special task force on industry problems whose recommendations appeared in a December, 1977

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[1] A. Kantrow, D. Dyer and J. Fox, Armco and the Bubble Policy, (1981) (distributed by HBS Case Services, Harvard Business School, Boston, Massachusetts 02163) (hereinafter cited as the "Harvard Study").

report, A Comprehensive Program for the Steel Industry. Seeking a middle ground between "environmental animus and industry complaint," the Solomon Committee recommended that government and industry cooperate in a study of new solutions to the problems of pollution control. Harvard Study at 2.

> Emissions standards, as then fixed by legislation, generally applied on a process-by-process basis to each individual stage of the steelmaking operations. They also applied, on a point-by-point basis, to individual sources of pollution. As a result, plants in violation of ambient air standards for total emissions could not remedy the situation merely by undertaking that mix of corrective actions that would have the greatest immediate effect on overall ambient air quality. Even though the problem had to do with the general level of TSP emissions, corrective action had to be addressed to specific contributory sources - whether or not they were responsible for the bulk of the problem.

Id. at 5.

Several flaws were thought to be implicit in the logic of this existing environmental regulation. For example:

> To those who, following the technology-forcing legislation, viewed abatement activity primarily in terms of individual process- or point-TSP emissions, the only appropriate measure of success was the absolute level of TSP reduction per individual source. If 80% of a given smokestack's emission could be

kept out of the atmosphere, 90% was even better, and 100% ("zero emissions") was best of all. At one level, of course, this was pure common sense; at another, however, it was profoundly misleading, for to think in these terms was to ignore the fact that each additional increment of pollution reduction costs a good deal more than the previous one. In other words, to achieve the last tiny marginal improvement in ambient air quality for a given smokestack - an improvement which, when measured in absolute TSP reduction, is insignificant - is far more expensive than to achieve gross TSP reductions for other pollution sources. For example, the first 95% of TSP reduction for an electric furnace cost 3.5¢/lb.; the next 4%, 30¢/lb.; and the final 1%, $35/lb.

Also implicit in the accepted regulatory logic, Armco felt, was the notion that all forms of pollution control employ roughly equivalent amounts of energy. In other words, the specific EPA standards, as they stood, made no allowance at all for the differential consumption of energy. [Armco's director of environmetnal engineering] thought this both narrow-minded and self-defeating: narrow-minded because energy, like clean air, was a finite good, meriting conservation; self-defeating because the production of usable energy itself entailed a certain predictable level of air pollution. There was a law of diminishing returns in control activity, a point beyond which the production of energy needed for incremental control created more emissions than it removed. For example, "To produce the electricity to run the fans and motors to clean up the scarfing machine [at the Kansas City plant] meant that the local power plant would produce more pollution than we will capture."

Id. at 6-7 (exhibits and footnotes omitted).

In seeking alternatives to this type of self-defeating regulation, EPA hired the Midwest Research Institute to develop a scientific basis for accurately estimating pollution from open dust sources. By 1978, the Institute had perfected a series of emissions factor equations for doing so. These equations made possible for the first time a full inventory of pollution sources. This test, using a methodology called "exposure profile sampling" yielded the following results at Armco's Middletown plant.

> Contrary to expectations, roughly 60% of particulates came neither from stack nor process emissions but, instead, from open dust sources. Even when differential particle size was taken into account, the result remained pretty much the same. For all particulates less than 30 um (microns), open dust emissions were six times greater than process fugitive emissions, which were the focus of EPA concern. For particulates less than 5 um (the size most responsible for ambient air quality more than 1 mile from an industrial site), open dust emissions were still three times greater than process fugitive emissions.
>
> Given these figures [Armco officials] realized that "there [was] very little room for further reduction [in TPS levels] from presently controlled sources by adding more efficient controls." To attack the remaining smokestack or process emissions would be to direct Armco's efforts toward a relatively minor part of the problem. . . .
>
> . . .To cite the most striking example, controlling windblown emissions from raw

materials piles would remove 284 tons of particulates from the air each year (a reduction of some 60%) at a capital cost of $200,000 - or $704 per ton - and with an energy expenditure of 46 KWH per ton. By contrast, controlling fugitive emissions from open hearth operations would remove only 64 tons of particulates from the air each year (a reduction of 80%) at a capital cost of $4,000,000 - or $63,992 per ton - and with an energy expenditure of 179,700 KWH per ton. These were staggering numbers indeed. By focusing efforts on open dust instead of process fugitive sources, Armco could get more particulates out of the air at 1/89th the cost per ton and with 1/3906th the energy.

Id. at 8-9 (exhibit and footnote omitted).

After much study and on-site monitoring of a pilot project at the Middletown plant, EPA announced the expected approval of Armco's specific bubble plan by EPA Administrator, Douglas M. Costle. In a press release issued on October 20, 1980, EPA stated:

> 'It is our judgment that Armco will be able to satisfy the "bubble" requirements and EPA will be able to act favorably on Ohio's State Implementation Plan for the area affected by the plant when it is submitted by the State,' Costle said.
>
> . . . .
>
> . . .A joint air monitoring study by federal, state and local governments and Armco has confirmed in a pilot project that this bubble is effective and has resulted in significant improvements in air quality.
>
> Armco's 'bubble' dust control plan would eliminate 4,000 tons per year of

particulates as compared to 652 tons per year under existing regulations.

Harvard Study, Part D, Ex. 2, p.2-3 quoting EPA "Environmental News." (emphasis added).

Following submission of the required technical support documents, EPA formally proposed the conditional approval of the Ohio plan on January 27, 1981, 46 Fed. Reg. 8683, and gave that approval on March 31, 1981, 46 Fed. Reg. 19468. The Harvard Study and the data obtained by EPA in support of the Ohio plan illustrate that a policy which allows use of the "bubble" concept may provide significantly greater improvement in air quality than a contrary policy which precludes it.

In addition to providing greater improvements in air quality, the bubble policy may speed up the achievement of clean air standards because it enables firms operating the sources of air pollutants to revise their control policies to achieve the most cost effective method of meeting the requirements of the Act. Plant engineers may turn their sights to inventing new and more effective pollution control devices.

> Traditional 'command and control' regulations may actually deter the development of new

> technology because firms, fearing that new items of capital equipment will be specifically required, may hide information about more effective means of pollution reduction. By contrast, the bubble would serve as an incentive for developing cost-effective pollution control technology since, when not forced to use particular technologies, a buyer will choose the least expensive means of satisfying emissions limitations. Comment, An Overview of the Bubble Concept, 8 Colum. J. Envtl. L. 137, 155 (1982).

Some have voiced concern that use of the bubble might allow the reduction of less harmful emissions as a tradeoff for not reducing more hazardous air pollutants. This objection is not well-founded. The equivalence of tradeoffs may be addressed directly. Limitations designed to ensure that the facility-wide definition of stationary source is used to improve air quality and meet other requirements of the Act are not incompatible with the bubble concept. See EPA's Widening Embrace of the Bubble Concept: The Legality and Availability of Intra-Source Trade-Offs, 9 Envtl. L. Rep. 10027, 10029 (1979).

Thus, since the use of the bubble concept has been shown to be capable of improving air quality, use of the bubble in nonattainment areas is not

inconsistent with the purpose of Congress in enacting Part D of the Act.

II. The policy judgment of the Administrator was rejected in a way in conflict with Batterton and Train.

It is well established both by principles of administrative law and the decisions of this Court that in the absence of a conflict between the policy judgment of an agency administrator charged with responsibility for implementing a federal statute and either the language or purpose of that act, the agency decision must be sustained. See Administrative Procedure Act, 5 U.S.C. § 706; Batterton v. Francis, 432 U.S. 416 (1977); and Train v. NRDC, 421 U.S. 60, (1975). In the decision below, that principle was turned on its head when the court of appeals substituted its judgment for the policy decision of the EPA Administrator to approve state implementation plans allowing the use of a bubble concept which is based on the language of the Act itself. A facility-wide definition of "stationary source" in the verbatim language of Section 111 of the Act, 42 U.S.C. § 7411, was the regulatory mechanism

utilized by EPA to authorize the "bubble" concept for the nonattainment provisions of Part D of the Act.

The presumption in favor of the agency's policy judgment is based on practical concerns about the proper utilization of agency expertise. As noted in Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978):

> The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the construction and administration of a given statute or its predecessors. Where, as here, the agency has extensive experience, has relied on the common meaning of the relevant statute's specific language, and can point to important congressional purposes furthered by its interpretation, only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations.

The special competence of EPA to interpret its mandate under the Clean Air Act is well recognized. In Train, this Court sustained an EPA regulation as "sufficiently reasonable" without going so far as to hold that such construction was "the only one it permissibly could have adopted," 421 U.S. at 75.

This Court also noted that judicial review should allow a proper degree of flexibility for administrative proceedings:

> The fact that the interpretation placed on the section by the Agency may on occasion require administrative flexibility and ingenuity to a greater degree than would a more rigid alternative is not, of course, a reason for rejecting the Agency's otherwise reasonable construction.

421 U.S. at 94 n. 28.

The limitations on judicial review of administrative action were reiterated by this Court in Batterton. The Secretary, similar to the EPA Administrator, was delegated authority by Congress to prescribe standards in order to accomplish the purposes of the Act. This Court stated the applicable principle of law as follows:

> In a situation of this kind, Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

432 U.S. at 426.[2]

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[2]Here, the court of appeals noted specifically that "EPA, it is not disputed, has authority to define the constituent terms of source enumerated in the statute ('building, structure, facility or installation') in a

Under these circumstances, where there is no conflict with the language of the Act, the legitimate inquiries a reviewing court should make are whether the administrator "exceeded his statutory authority" and whether the "regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 426. The decision below clearly failed to do so. As a result, the court of appeals substituted its judgment for the policy judgment of the EPA Administrator in the absence of any conflict with either the language or the purpose of the Act. It did so by relying solely on the prior decision in ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C.Cir. 1978), as having established that the bubble concept is inconsistent with the improvement of air quality.[3] ASARCO, however,

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manner that will best effectuate the expressed purposes of the Act." 685 F.2d at 723 n. 22; Chevron Pet. Cert. Appx. at A-9 n. 22.

[3]685 F.2d at 727-28; Chevron Pet. Cert. Appx. at A-16-17. "We express no view on the decision we would reach if the line drawn in Alabama Power and ASARCO did not control our judgment." 685 F.2d at 720 n. 7; Chevron Pet. Cert. Appx. at A-4 n.7. Alabama Power Co. v. Costle, 636 F.2d 323 (D.C.Cir. 1979), mandated a bubble concept under Part C of the

did not hold that the bubble concept is incompatible with improving air quality.[4]

The regulation involved in ASARCO sought to redefine the statutory term "facility" in Section 111 of the Act to mean "a combination of such units." 578 F.2d at 327. This was rejected as "inconsistent with the language of the Act." Ibid. The ASARCO court clearly stated that its consideration of "the purpose of the Clean Air Act and Section 111" merely "reinforced" the decision which was based on this conflict between the language of the regulation involved in that case and the language of the Act. Ibid. No such conflict is present in this case. The regulation here at issue incorporates the relevant statutory language verbatim. It does not redefine "facility" or any other statutory

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Act, 42 U.S.C. § 7470 et seq., for areas which have attained the national ambient air quality standards.

[4] Amicus here assumes arguendo that ASARCO was correctly decided on its own terms. The alternative argument that ASARCO should not be controlling here because it was incorrectly decided and conflicts with Alabama Power, must also be noted. See Chevron Pet. Cert. pp. 7-10.

term.[5] Accordingly, since the basis of the ASARCO decision is completely inapplicable to this case, it cannot be controlling here.

The reinforcing dictum of ASARCO that the bubble concept is inconsistent with "the purpose of the Clean Air Act and Section 111," could not and did not hold that the different application of the differently worded bubble concept which the Administrator here adopted for Part D of the Act is inconsistent with the improvement of air quality.[6] By ruling otherwise, the court below failed to make even one of the rulings or findings required to set aside the action of the Administrator under the Administrative Procedure Act, 5 U.S.C. § 706. Policy decisions of an agency are "entitled to more than mere deference or weight" and

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[5] ASARCO expressly noted that, in proper circumstances, the statutory term "facility" could cover an entire plant. 578 F.2d at 324 n. 17.

[6] 578 F.2d at 327-30 (emphasis added). Even if it had done so, such a conclusion would be subject to reconsideration as inconsistent with the factual data subsequently developed by EPA, including the measurement techniques developed for EPA by the Midwest Research Institute and the joint monitoring study at Middletown. See pp.6-8 supra.

can be set aside only if the Administrator "exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 432 U.S. at 426.

CONCLUSION

The Court below has decided an important question of federal law which has not been, but should be, settled by this Court and has done so in a way in conflict with the decisions of this Court in Batterton and Train.

For these reasons and the reasons set forth in the petitions, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

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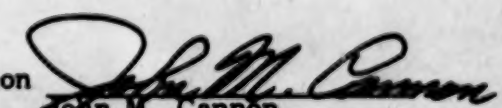

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Nos. 82-1005, 82-1247 & 82-1591

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

CHEVRON U.S.A. INC., a corporation, et al.,
Petitioners,

VS.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
Respondents.

BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

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QUESTIONS PRESENTED

Did the court of appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency

(1) to promulgate regulations which simply conformed EPA's regulatory definition of "stationary source" to the definition set forth in the Clean Air Act; and

(2) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?[1]

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[1]Petitioners in the proceeding below were Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc.

Respondent in the proceedings below was Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency.

Chevron U.S.A. Inc. was an intervenor-respondent in the proceedings below. Chevron U.S.A. Inc. is a wholly owned subsidiary of Standard Oil Company of California, a publicly owned corporation. Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Intervenor-respondents in the proceedings below, other than Chevron U.S.A. Inc., are listed in Appendix D to Chevron's Petition for a Writ of Certiorari, No. 82-1005.

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Respondents.

BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

OPINIONS BELOW

The opinion and the judgment of the court of appeals for the District of Columbia Circuit ((D.C.Cir. 1982) 685 F.2d 718) is printed in Appendix A to Chevron's Petition for a Writ of Certiorari, No. 82-1005. The orders of denial of rehearing en banc are printed in Appendix B to Chevron's Petition for a Writ of Certiorari.

JURISDICTION

The opinion and the judgment of the court of appeals were filed and entered on August 17, 1982 (Chev.Pet., Appx. A), and its orders denying rehearing were filed and entered October 27, 1982 (Chev.Pet., Appx. B). Petitioner

Chevron U.S.A. Inc. filed its petition for a writ of certiorari on December 15, 1982. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves §§ 110, 111, 171, 172 and 173 of the Clean Air Act (42 U.S.C. §§ 7410, 7411, 7501, 7502, 7503), the pertinent provisions of which are set forth in Appendix C to Chevron's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Clean Air Act and EPA's regulations

The Clean Air Act establishes a comprehensive Federal-state-local program to control existing and new sources of air pollution (Chev.Pet., Appx. A, p. A-4). Pursuant to the Act, the Environmental Protection Agency ("EPA") has prescribed national ambient air quality standards sufficient to protect the health and welfare of all citizens (42 U.S.C. § 7409(b)). The Act and elaborate EPA rules require all states to adopt, and submit to EPA for approval, State Implementation Plans for attaining those standards (Chev. Pet., Appx. A, pp. A-4 to A-5).

The 1977 amendments to the Clean Air Act, among other things, specifically mandated that the states establish permit programs "for the construction and operation of new or modified major stationary sources" in nonattainment areas, that is, areas which have not yet met one or more of the national ambient air quality standards (Chev.Pet., Appx. C, p. C-28; 42 U.S.C. § 7502(b)(6)). Under the 1977 amendments, no major stationary source may be constructed or major modification undertaken unless the state has demonstrated to EPA that its comprehensive implementation plan, of which the permit program is only one

part, assures reasonable further progress toward meeting Federal standards in the nonattainment area involved (Chev.Pet., App. A, p. A-8; 40 C.F.R. § 52.24). If the nonattainment area has no EPA-approved plan, the Act requires a construction moratorium—no major stationary source may be constructed or major modification undertaken in the area if it will emit the "nonattainment" pollutant (Chev.Pet., App. A, p. A-8; 42 U.S.C. § 7410(a)(2)(I)).

On October 14, 1981, EPA adopted a plantwide definition of "stationary source" for permit programs in nonattainment areas (Chev.Pet., Appx. A, p. A-11; 46 Fed.Reg. 50766 (Oct. 14, 1981)). Under that definition, a "stationary source" is defined as "any building, structure, facility, or installation" (40 C.F.R. §§ 51.18(j), 52.24(f); 46 Fed.Reg. 50771 (Oct. 14, 1981)).

Previous EPA regulations, adopted in August, 1980 and repealed on October 14, 1981, had defined "installation," and accordingly, "stationary source," to include not only a plant, but also each individual piece of equipment at a plant (45 Fed.Reg. 52,746 (Aug. 7, 1980)). This "dual definition," however, posed a problem for both regulators and industry in determining what pieces of equipment constituted an "installation" or "stationary source" in a given situation (46 Fed.Reg. 50768 (Oct. 14, 1981)). More seriously, the dual definition discouraged replacement of older, dirtier industrial processes with new, cleaner ones (46 Fed. Reg. 50766 (Oct. 14, 1981)). In areas subject to the construction moratorium, for example, a plant could not modernize if any of the new pieces of equipment involved in a modernization would produce emissions above de minimis levels, even if the modernization as a whole would actually decrease emissions from the plant (46 Fed.Reg. 50768 (Oct.

14, 1981)). Accordingly, EPA decided to replace the dual definition with a plantwide definition of "stationary source."

Under the plantwide definition, a modification would be subject to the construction moratorium or permit requirements applicable to "major modifications" of "stationary sources" only if the net emission increase from the plant as a whole would be above the statutory or regulatory triggers (Chev.Pet., Appx. A, p. A-11, n. 26). Modifications which did not increase plantwide emissions above statutory or regulatory de minimis levels would not be treated as "major modifications" (Chev.Pet., Appx. A, p. A-11, n. 26). The EPA plantwide definition thus applied the "bubble concept"—an entire plant and its emissions may be viewed as if placed under one bubble (Chev.Pet., Appx. A, p. A-2, n. 1). Under the bubble concept, air pollution regulations focus on the net effect of changes in an entire plant, rather than subjecting each individual unit or piece of equipment within a plant to the entire permit process (Chev.Pet., Appx. A, p. A-2, n. 1).

The primary reason advanced by EPA for adopting the plantwide definition is that the definition allows states greater flexibility in developing nonattainment programs, and thus complies with Congress' mandate that states have the primary responsibility for pollution control (Chev. Pet., Appx. A, pp. A-11 to A-12).[2] The bubble concept affords states flexibility by freeing the enormous time, money and other regulatory resources which would otherwise be required to conduct extensive permit proceedings for each

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[2]EPA also reasoned that regulatory complexity would be reduced because the plantwide definition of stationary source had previously been held to lawfully apply in another permit program administered by EPA under the Clean Air Act (Chev.Pet., Appx. A, p. A-11).

and every component of industrial plants (and perhaps every piece of new or modified industrial equipment) in the area. Those resources may then be reallocated to the critical aspects of air pollution control, such as controlling automobile emissions in certain states (J.A. 136-137, 165-166).

Chevron's project

Petitioner, CHEVRON U.S.A. INC. ("Chevron"), produces, refines and markets petroleum and petroleum products. Chevron has planned, designed and substantially constructed a large, high-technology modification to its refinery in the San Francisco Bay Area (J.A. 157-160). Chevron's project, permitted under the plantwide definition of source, will *decrease* emissions of all air pollutants from the refinery, and generate 1,200 construction jobs and 45 permanent jobs (J.A. 158).

The Chevron project involves construction of new, state-of-the-art equipment for producing lubricating oils. The new equipment will replace old equipment formerly used by Chevron for processing lubricating oils at the plant.[3] The various emissions from the new lube oil equipment will be completely offset by, among other things, the shutdown of the old equipment—which was installed in the late 1930's—and the accompanying increased pollution control efficiency at Chevron's plant (Feldstein Decl., Exh. B, p. 5). The Bay Area Air Quality Management District ("District")—the local agency charged under the Act and California law with regulation of emissions from industrial equipment in the

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[3]Declaration of Milton Feldstein in Opposition to Petitioner's Motion for a Stay and for other Relief Pending Review (hereinafter "Feldstein Decl."), Exh. B, p. 1.

Bay Area—has estimated that the Chevron project will reduce sulfur dioxide emissions from the Richmond plant by 45.54 pounds per hour, nitrogen oxide by 15.27 pounds per hour, carbon monoxide by 10.85 pounds per hour, hydrocarbons by 18.22 pounds per hour and particulate matter by 4.20 pounds per hour (J.A. 161). In light of the offset of emissions from the new equipment by the shutdown or modification of old equipment, the District issued a permit for the Chevron project.[4] The Hearing Board of the District, after conducting some 9 months of hearings on challenges to the propriety of issuing the permit, determined that the permit is entirely valid.[5] That decision is now final as to all parties.[6]

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[4]A copy of that permit is attached as Exhibit B to the Declaration of Milton Feldstein in Opposition to Petitioner's Motion for a Stay and for Other Relief Pending Review.

[5]The Hearing Board's order stated, in pertinent part:

> "[T]he evidence before us does not show the RLOP [Chevron's project], when constructed and operated according to the limitations of the Authority, will have any adverse effect on air quality. The emission increases associated with the operation of the new units to be built in connection with RLOP are to be offset by emission reductions due to the shutdown of the old lube oil processing units, increased incinerator temperatures at the phthalic anhydride plant at the refinery and by using the emission credits currently accrued by Chevron in its internal bank since December 20, 1977, in accordance with District Rule 2-2-205. To guard against any potential, increased emissions elsewhere in the refinery due to the operation of these new units, the District has limited the emissions from the refinery on an annual and monthly basis" (*In the Matter of the Appeal of Citizens for a Better Environment, et al., from the Grant of Authority to Construct, Application No. 27797* (Hearing Board of the Bay Area Air Quality Management District, California, Mar. 3, 1983) Order Denying Appeal, Docket No. 837, p. 12).

[6]In the proceedings before the Court of Appeals in the instant case, respondents relied heavily upon a declaration of Jeff Gabe

The proceedings below

Respondents Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc. filed a petition for review of the October 14, 1981 EPA regulations (Chev.Pet., Appx. A, p. A-12). Chevron and various other members of the industrial community intervened in support of the regulations (Chev.Pet., Appx. A, p. A-12).

The court of appeals vacated EPA's revised regulations, holding that the bubble concept is *per se* inconsistent with the Clean Air Act's nonattainment programs (Chev.Pet., Appx. A, pp. A-16 to A-18). The court of appeals announced a "bright line test"—based on two cases, *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C. Cir. 1978) 578 F.2d 319—for determining the propriety of EPA's use of the bubble concept: The concept would be mandatory in programs designed to maintain existing air quality, but per se inappropriate in programs to improve air quality (Chev.Pet., Appx. A, p. A-16). The court of appeals concluded that the bubble concept was per se inappropriate in the case at bar, and considered it unnecessary to determine whether the regulations in question

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(J.A. 167-176). It is significant that Jeff Gabe, research director of Citizens for a Better Environment (one of the respondents here), was one of the parties in the proceedings before the Hearing Board, as was Citizens for a Better Environment. The Board conducted extensive hearings to consider the arguments raised by Gabe there and repeated in his declaration filed in this case; the Board rejected all assertions that the Richmond project would have any adverse effect on air quality (supra, p. 6, n. 4). Neither Gabe nor any of the other parties sought review of the Board's findings. Those assertions, having been rejected by the Hearing Board, should be ignored by this Court.

promoted the improvement of air quality or whether the bubble concept was consistent with the language and legislative history of the Clean Air Act (Chev.Pet., Appx. A, p. A-19).

On October 27, 1982, the court of appeals denied a petition for rehearing; Judge MacKinnon voted to grant a rehearing en banc (Chev.Pet., Appx. B).

On May 31, 1983, this Court granted the petitions for writs of certiorari filed by Chevron (No. 83-1005), American Iron and Steel Institute, et al. (No. 82-1247) and William D. Ruckelshaus, Administrator, Environmental Protection Agency (No. 82-1591); the cases were consolidated (J.A. 5).

SUMMARY OF ARGUMENT

The court of appeals erroneously substituted its judgment for that of EPA on basic policy issues, even though the court below did not, and could not, find EPA's regulations to be unreasonable. This Court has recognized that where an agency's regulation adopts a "reasonable" statutory construction, the courts are precluded from substituting their judgment for that of the agency (*Train* v. *Natural Resources Def. Council* (1975) 421 U.S. 60, 87). The court of appeals, however, prohibited EPA from using the bubble concept in nonattainment areas solely because of the court's policy judgment that the bubble concept would cause unacceptable harm to air quality. But this policy judgment of the court below is contrary to the judgment of EPA and the judgment of Congress.

The court of appeals barred EPA from using the bubble concept in areas with air pollutant levels exceeding Federal ambient standards, even though the court could not identify any provisions of the Clean Air Act which would support its decision. In fact, the EPA regulations implementing the bubble concept are entirely consistent with the provisions of the Act. The regulations in question here simply conformed EPA's definition of the term "stationary source" to the statutory provisions of the Clean Air Act; EPA defined stationary source as "any building, structure, facility, or installation," the precise definition in section 111(a)(3) of the Act. In so conforming the definition, EPA acted rationally, reasonably, and well within both the terms of the Act and its agency discretion.

The EPA regulations implementing the bubble concept are also consistent with the purposes of the nonattainment provisions of the Act. Those purposes may be ful-

filled with no adverse effect upon public health: The EPA regulations allow growth where de minimus emissions are involved and permit construction or modification of major stationary sources only where the state has demonstrated that its program meets the goals and air quality standards of the Clean Air Act.

Consistent with the purposes of the nonattainment provisions, the bubble concept affords the states flexibility by allowing them to control stationary source emissions in the most expeditious and cost-effective manner. In addition, the bubble concept furthers Congress' goals by encouraging modernization and expansion of industrial plants. The bubble concept provides an incentive for industry to modify and retire old, poorly controlled facilities and to develop effective and cost-efficient air pollution control (J.A. 128-129, 136). Under the bubble concept and the EPA regulations, for example, Chevron may replace its old lube oil equipment with new equipment which will *reduce* emissions from Chevron's plant. Chevron's project is an example of the many beneficial projects which may be halted or not initiated if the ruling below is not reversed.

I. IN HOLDING THAT EPA MAY NOT PROMULGATE REGULATIONS USING THE BUBBLE CONCEPT IN NONATTAINMENT AREAS, THE COURT OF APPEALS ERRONEOUSLY SUBSTITUTED ITS JUDGMENT FOR THAT OF EPA ON BASIC POLICY ISSUES.

This case presents a clear instance in which the court of appeals exceeded its limited scope of judicial review of an agency's administrative action. It is well settled that where EPA, or any other administrative agency, adopts regulations implementing a "sufficiently reasonable" construction of a statute, a court of appeals is precluded "from substituting its judgment for that of the Agency" (*Train* v. *Natural Resources Def. Council* (1975) 421 U.S. 60, 87).

In the case at bar, the court of appeals did not, and could not, find EPA's regulations to be unreasonable. EPA reasonably decided to adopt a plantwide definition of "stationary source" in nonattainment areas for two valid reasons: (1) to allow states greater flexibility in developing nonattainment programs, pursuant to Congress' mandate (Chev.Pet., Appx. A, pp. A-11 to A-12); and (2) to reduce regulatory complexity by adopting the same plantwide definition previously applied in another permit program administered by EPA under the Clean Air Act (Chev.Pet., Appx. A, p. 11). Yet the court of appeals vacated EPA's regulations, even though the court could not identify any provisions of the Clean Air Act which would support its decision.

The only rationale offered by the court of appeals was that its prior decisions in *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir 1978) 578 F.2d 319 "establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept" (Chev.Pet., Appx. A, p. A-16). That bright line test, the court asserts, is as follows:

> "The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to *improve* the quality of the ambient air" (Chev.Pet., Appx. A, p. A-16; emphasis added).

In fact, there is no support in either the provisions of the Clean Air Act, its legislative history, or the *ASCARCO* and *Alabama Power* cases[7] for such a bright line test.

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[7]In fact, it is widely acknowledged, except by the court below, that *Asarco* and *Alabama Power* are irreconcilably in conflict:

II. THE EPA REGULATIONS IN QUESTION SIMPLY CONFORM THE REGULATORY DEFINITION OF "STATIONARY SOURCE" TO THE DEFINITION SET FORTH IN THE CLEAN AIR ACT.

The Clean Air Act provides no support for the ruling below. The bubble concept, and the EPA regulations implementing that concept in nonattainment areas, are entirely consistent with the provisions of the Act. Section 172(b)(6) of the Clean Air Act requires that the states establish permit programs "for the construction and operation of new or modified major stationary sources" (Chev.Pet., Appx. C, p. C-28; 42 U.S.C. § 7502(b)(6)) in nonattainment areas. For purposes of the nonattainment provisions of the Act in issue here, "[t]he terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 111(a)(4) of this Act" (91 Stat. 746; Chev.Pet., Appx. C, p. C-28; 42 U.S.C. § 7501(4)). Section 111(a)(4) of the Act defines "modification" as: "any physical change in, or change in the method of operation of, a *stationary source* which increases the amount of any air pollutant emitted by such source or which results in the emission of

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"'*ASARCO* and *Alabama Power* reach opposite conclusions, *interpreting an identical definition* of source but coming to completely different determinations about the validity of the bubble concept. No clear reason emerges from the opinions to explain the differences. Because the D.C. Circuit failed to reexamine *ASARCO* in light of its conclusions in *Alabama Power*, and instead tried to distinguish it, the two decisions leave no clear holding on the validity of the bubble concept'" (An Overview of the Bubble Concept (1982) 8 Colum.J. Envtl.L. 137, 151; emphasis added; see Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat.Resources L. 177, 215; Landau, *Alabama Power Co.* v. *Costle*: An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Envtl.L. 585, 626).

any air pollutant not previously emitted" (Chev.Pet., Appx. C, p. C-27; 42 U.S.C. § 7411(a)(4); emphasis added). The term "stationary source" as used in § 111(a)(4) is itself defined in § 111(a)(3): "The term 'stationary source' means *any building, structure, facility, or installation* which emits or may emit any air pollutant" (Chev.Pet., Appx. C, p. C-27; 42 U.S.C. § 7411(a)(3); emphasis added).

The 1981 regulations in question here simply conformed EPA's definition of stationary source to the statutory provisions of the Clean Air Act by defining stationary source as "any building, structure, facility, or installation," *the precise definition in section 111(a)(3) of the Act* (see 46 Fed.Reg. 50771 (Oct. 14, 1981); 40 C.F.R. §§ 51.18(j), 52.24(f)). The prior, 1980 regulations had further defined the term "installation" as "an identifiable piece of process equipment"—*a definition which appears nowhere in the Act* (45 Fed.Reg. 52746 (Aug. 7, 1980)). In 1981, EPA simply repealed its prior short-lived regulations defining "installation" as an identifiable piece of process equipment (46 Fed.Reg. 50766 (Oct. 14, 1981)).

Certainly, in so conforming the definition, EPA could not have committed a per se violation of the Act as the court of appeals held. In any event, EPA acted rationally, reasonably, and well within both the terms of the Act and its agency discretion in promulgating the 1981 regulations. Nothing in the Clean Air Act suggests—much less requires—that EPA should define "stationary source" so as to require permits for each individual piece of equipment in a plant.

III. THE EPA REGULATIONS IN QUESTION ARE IN ACCORD WITH THE LEGISLATIVE HISTORY AND PURPOSES OF THE CLEAN AIR ACT.

The legislative history of the Clean Air Act does not directly address the definition of stationary source or the use of the bubble concept (Chev.Pet., Appx. A, p. A-17, n. 39). The legislative history does establish, however, that the bubble concept is consistent with the purposes of the nonattainment provisions of the Act.

Congress clearly and unambiguously stated that the nonattainment provisions of the Act have

> "• • • two main purposes: (1) to allow reasonable economic growth to continue in [a nonattainment] area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford" (H.R.Rep.No. 294, 95th Cong., 1st Sess., p. 211 (1977)).[8]

[8] That this is the relevant legislative history is made clear by the Conference Report; the permit program for new and modified sources in nonattainment areas was taken from the House Bill (H.R.Rep.No. 564, 95th Cong., 1st Sess., p. 157 (1977); 1977 U.S.Code Cong. & Admin. News, p. 1537).

Respondents misstate the relevance of the legislative history of the House Bill (Respondents' Br. in Opp. to Pets., p. 16, n. 31). Chevron does not claim that the above-quoted passage "chang[es] the basic 'source' definition" (ibid.); the legislative history is significant, however, to establish that the bubble concept is consistent with the purposes of the nonattainment provisions. The suggestion that the purposes of allowing reasonable economic growth and allowing states greater flexibility apply only to two specific aspects of the nonattainment provisions is simply incorrect. Respondents' reliance upon the "pages of the Report which follow" the above-quoted statement of purposes is misplaced, as those pages similarly state that a purpose of the nonattainment provisions "is to give the States more flexibility in determining how to protect public health while still permitting reasonable new growth" (H.R.Rep.No. 294, 95th Cong., 1st Sess., p. 213 (1977)).

Had the court of appeals considered whether the bubble concept is consistent with those purposes, the uncontroverted factual record before EPA and the court of appeals would have shown that the bubble concept will not contravene or in any way impede those objectives.

The bubble concept affords the states flexibility: In some states, where automobile emissions rather than stationary source emissions prevent the state from meeting Federal air quality standards, use of the plantwide bubble concept is irrelevant to attainment of those standards.[9] The bubble concept would enable these states to reallocate their resources to automobile emission control, rather than waste limited regulatory resources on inspection and the issuance of permits for each and every piece of industrial equipment in nonattainment areas under a "dual definition." States are anxious to demonstrate that use of the bubble concept is fully consistent with timely attainment of air quality standards in the most expeditious and cost-effective manner.[10] But the ruling below precludes any state from using the bubble concept, regardless of whether that concept suits its needs.

In the San Francisco Bay Area, for example, control of pollution from automobiles, rather than from industry, is the key to effective air quality control (J.A. 165-166). The Bay Area Air Quality Management District has promulgated permit rules which, while stringent (J.A. 163), are

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[9]See e.g., comments of the Arizona Department of Health Services (J.A. 136).

[10]See, e.g., comments of the California Air Resources Board (J.A. 154-155); Ohio Regional Air Pollution Control Agency (J.A. 120); New York State Department of Environmental Conservation (J.A. 128-129); Missouri Department of Natural Resources (J.A. 130); Ohio EPA (J.A. 138).

easy to enforce because they allow industry to offset emission increases in one sector of a plant with decreases in other sectors (Feldstein Decl., Exh. A, p. 2-2-6). Thus, the District can ensure that a plant's emissions are in compliance with the Clean Air Act, without monitoring and conducting permit proceedings for each and every individual piece of equipment in the plant. Without the flexibility of the bubble concept, for example, the District would be forced to issue a separate permit for *each* individual piece of process equipment in the Chevron project, which involves construction or modification of scores of furnaces, reactors, exchangers, filters, compressors and cooling towers (see Feldstein Decl., Exh. B, p. 2). The resulting drain on the limited administrative resources of the District would be enormous. Moreover, conducting permit proceedings for individual pieces of equipment is simply unnecessary since local districts could, under the bubble concept, fashion regulations which result in net *reductions* in emissions from all plant modifications or expansions (J.A. 164).[11]

It should also be noted that the decision below, by precluding state flexibility, violates the principles expressed by this Court in *Train* v. *Natural Resources Def. Council* (1975) 421 U.S. 60. In *Train*, this Court recognized that the

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[11]The Bay Area Air Quality Management District, for example, has promulgated permit rules which allow maximum emissions from the modified facility based on the actual emissions from the old facility, averaged over a period of years, or "baseline" (J.A. 164). Thus, the "baseline" emissions set a ceiling for emissions from the modified facility, which may operate at or below the baseline average emissions from the old facility, but never above that level (ibid.).

states have the primary role in determining the specific emission limitations necessary to meet national standards (421 U.S. 79).

> "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation" (421 U.S. 79).

But the decision below bars all use of a plantwide definition implementing the bubble concept, even where a state demonstrates that use of the bubble concept will not impede timely attainment of air quality standards.

Moreover, the bubble concept is consistent with Congress' goal of allowing reasonable economic growth while the states make reasonable further progress to attainment of Federal air quality standards. The bubble concept encourages modernization and expansion of industrial plants, and "reasonable further progress" is assured because the EPA regulations in question allow construction of major stationary sources or major modifications only if the state has demonstrated to EPA that its air quality plan assures reasonable further progress toward meeting air quality standards (Chev.Pet., App. C, p. C-29; 40 C.F.R. § 52.24).

The application of the bubble concept to Chevron's Richmond Lube Oil Project demonstrates the importance of the concept to effective air pollution control. Chevron's project is being constructed in Richmond, California, an area in which the air quality already meets all primary Federal standards (J.A. 159).[12] The Richmond Lube Oil

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[12]The area remains classified a "nonattainment" area for two pollutants because of *past* pollution levels.

Project will result in net *decreases* in emissions into the air from Chevron's refinery (J.A. 165). The decreases in emissions result from the construction of new lube oil processing equipment which will totally replace old, poorly controlled equipment which was installed in the late 1930's (Feldstein Decl., Exh. B, p. 5). The modification and replacement of equipment in Chevron's project will reduce emissions by:

80 tons per year of organic compounds (precursors to photochemical smog);
199 tons per year of sulfur dioxide;
67 tons per year of nitrogen oxides;
48 tons per year of carbon monoxide;
18 tons per year of particulate matter
(Feldstein Decl., Exh. B, p. 3).

The Richmond Lube Oil Project will also use the "best available control technology" to minimize emissions (J.A. 158), and the Bay Area Quality Management District has issued a permit with conditions imposing stringent sanctions if the plant's emissions ever exceed the limits set forth in the permit (Feldstein Decl., Exh. B, p. 6).

Projects like the Richmond Lube Oil Project are essential to continued economic growth. Chevron's project in the Bay Area involves costs in excess of $500,000,000, will generate 1,200 construction jobs and 45 permanent jobs, and will process 30,000 barrels of oil per day. In contrast to the economic growth allowed by the bubble concept, the ruling below results in a stifling of economic growth, contrary to the express goals of Congress. The Clean Air Act requires a construction moratorium in nonattainment areas

without EPA-approved plans, but the terms of the Act apply that moratorium only to "major stationary sources" with emissions increases above threshold levels established by statute. The ruling below, however, will result in a moratorium on expansions or modifications of plants with net emission increases *below those threshold levels.*[13] By prohibiting all use of the bubble concept in nonattainment areas, the court of appeals has extended the construction moratorium to projects in which a proposed piece of equipment or unit within a plant would increase emissions, even if the expansions or modifications to the plant as a whole would not exceed statutory limits or would result in net *decreases* in emissions. These industrial projects will simply not be constructed if the ruling below is allowed to stand.

In holding that EPA may not promulgate regulations using the bubble concept, the court of appeals has substituted its judgment for that of EPA on basic policy issues. The court of appeals prohibited EPA from using the bubble concept in nonattainment areas *solely because of the court's policy judgment that the bubble concept would cause unacceptable harm to air quality.* But this policy judgment of the court below is contrary to the judgment of EPA and the judgment of Congress: Under the plantwide definition of "stationary source" in nonattainment areas adopted by

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[13]For example, under the ruling below a refinery owner could not modify its plant if the proposed modification involved an increase in hydrocarbon pollution in excess of 40 tons each year (the de minimis level) for a given piece of equipment; the modification would be precluded even if other components of the modification would reduce pollution by 100 or 1,000 tons each year and result in a substantial net *decrease* plantwide.

EPA a project would be allowed to proceed only if any net emission increase from the plant as a whole is below the maximum levels *allowed by statute*. Thus, any increase in emissions from a plant using the bubble concept is, by definition, of a de minimis amount which *Congress has found to be acceptable and consonant with achievement of attainment in nonattainment areas.*[14] The court of appeals may not second-guess the judgment of Congress in setting the acceptable levels of emissions, nor may the court usurp EPA's judgment in fashioning regulations to meet those levels.[15]

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[14]Contrary to respondents' assertion (Respondents' Br. in Opp. to Pets, pp. 4-5, n. 9), EPA's regulations allow modifications only if the net *cumulative* emission increase is below de minimis levels (40 C.F.R., Part 51, Appx. S, ¶ II.A.6; 40 C.F.R. § 52.24(f)(6)). Respondents' suggestion that a refinery owner could build new storage tanks increasing hydrocarbon pollution by 40 tons each year is simply incorrect. The October 14, 1981 EPA regulations would only allow a total 40-ton increase for the *entire* refinery over a five-year period (ibid.).

Similarly, the permit rules of the Bay Area Air Quality Management District require that *all cumulative increases* in emissions from a given facility of more than 250 pounds per day over a specified period of time *must be offset* in accordance with the permit rules (J.A. 164).

[15]There is no merit to respondents' assertion that the EPA regulations in question will adversely affect public health (Respondents' Br. in Opp. to Pets., pp. 24-26). Those regulations allow a major stationary source to be constructed or major modification made only if the state has demonstrated to EPA that its overall air quality plan for the state assures reasonable further progress toward meeting air quality standards (supra, pp. 2-3). Moreover, under the EPA regulations in question, a project in a state with an unapproved plan would be allowed to proceed only if any net cumulative emission increase from a plant is below the maximum levels which Congress has found to be acceptable (supra, p. 4).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Nos. 82-1005, 82-1247 and 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A. INC., a corporation,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION

August 31, 1983

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QUESTIONS PRESENTED

1. Whether the court below impermissibly intruded upon the discretion vested in the states by the Clean Air Act when that court deprived the states of the authority to define the term "source" as an industrial plant for their new source review programs in nonattainment areas, even where such a definition is demonstrated to be consistent with reasonable further progress toward, and timely attainment of, national ambient air quality standards.
2. Whether the court below wrongfully substituted its policy judgment for that of EPA, when it determined, without support in the language or legislative history of the Clean Air Act or in the record before it, that EPA had no authority to define "source" as an industrial plant or to allow the states to adopt a similar definition of "source" for the purposes of new source review programs in nonattainment areas.
3. Whether the court below erred in vacating EPA's rescission of "reconstruction," a regulatory definition not found in the Clean Air Act which had imposed new source-related preconstruction review requirements upon modifications of industrial facilities.
4. Whether the court below imposed on EPA an unduly high burden to justify rescission of a portion of its rules implementing Part D of the Clean Air Act.

LIST OF PARTIES BELOW

The Natural Resources Defense Council, Inc. (NRDC), Citizens For A Better Environment, Inc., and the Northwestern Ohio Lung Association, Inc. were petitioners in the proceedings below. Respondents below were the Environmental Protection Agency (EPA) and Anne M. Gorsuch, Administrator of EPA.[1] The American Iron and Steel Institute and seven of its member companies,[2] the American Petroleum Institute and thirteen of its member companies,[3] the Chemical Manufacturers Association, General Motors Corporation, the Rubber Manufacturers Association and a group of 81 electric power generating companies and two electric utility trade associations[4] were intervenor-respondents below.[5]

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[1] William D. Ruckelshaus has since replaced Ms. Gorsuch as Administrator of EPA.

[2] Allegheny Ludlum Steel Corporation, Armco Inc., Bethlehem Steel Corporation, Carpenter Technology Corporation, Inland Steel Company, Jones & Laughlin Steel Corporation, Republic Steel Corporation, and United States Steel Corporation.

[3] Atlantic Richfield Company, Chevron U.S.A. Inc., Continental Oil Company, Exxon Corporation, Gulf Oil Corporation, Marathon Oil Company, Mobil Oil Corporation, Phillips Petroleum Company, Shell Oil Company, Standard Oil Company (Indiana), Texaco Inc., The Standard Oil Company (Ohio), and Union Oil Company of California.

[4] Alabama Power Company, Appalachian Power Company, Arizona Public Service Company, Baltimore Gas and Electric Company, Boston Edison Company, Carolina Power & Light Company, Central and South West Corporation, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, West Texas Utilities Company, Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central Maine Power Company, The Cincinnati Gas & Electric Company, Columbus and Southern Ohio Electric Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Consumers Power Company, The Dayton Power and Light Company, Delmarva Power & Light Company, The Detroit Edison Company, Duke Power

Company, Florida Power Corporation, Florida Power & Light Company, Georgia Power Company, Gulf Power Company, Gulf States Utilities Company, Houston Lighting & Power Company, Illinois Power Company, Indiana & Michigan Electric Company, Indianapolis Power & Light Company, Iowa-Illinois Gas and Electric Company, Iowa Power and Light Company, Iowa Public Service Company, Kansas City Power & Light Company, Kentucky Power Company, Kentucky Utilities Company, Madison Gas and Electric Company, Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc., Mississippi Power Company, Monongahela Power Company, Nevada Power Company, New England Power Company, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Northeast Utilities Service Company, The Connecticut Light and Power Company, The Hartford Electric Light Company, Holyoke Water Power Company, Western Massachusetts Electric Company, Northern Indiana Public Service Company, Ohio Edison Company, Pennsylvania Power Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas and Electric Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, The Potomac Edison Company, Potomac Electric Power Company, Public Service Company of Indiana, Inc., Public Service Electric and Gas Company, Rochester Gas and Electric Corporation, Salt River Project, San Diego Gas & Electric Company, Southern California Edison Company, Tampa Electric Company, Texas Utilities Generating Company, Toledo Edison Company, Tucson Electric Power Company, Union Electric Company, Virginia Electric and Power Company, West Penn Power Company, Wisconsin Electric Power Company, Wisconsin Power and Light Company, Wisconsin Public Service Corporation, the Edison Electric Institute, and the National Rural Electric Cooperative Association.

[5] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies of, and the non-wholly owned subsidiaries and affiliates of each corporate party upon whose behalf this Brief is filed are set forth in the Appendix to the Petition for a Writ of Certiorari in No. 82-1247 at 34a-61a. Corrections of and additions and deletions to the list of non-wholly owned subsidiaries and affiliates of three of the American Petroleum Institute's member companies, Phillips Petroleum Company, Gulf Oil Corporation, and Mobil Oil Corporation, are set forth in Appendix C hereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1005

CHEVRON U.S.A. INC., a corporation,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

No. 82-1247

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

No. 82-1591

ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS
AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION

OPINIONS BELOW

The opinion of the court of appeals is reported at 685 F.2d 718 and is reprinted in the appendix to Chevron U.S.A. Inc.'s petition for a writ of certiorari, No. 82-1005 ("Chev. Pet. App."), at A-1 to A-20. The Environmental Protection Agency's final regulations and statement of basis and purpose are published at 46 Fed. Reg. 50766 (October 14, 1981) and are reprinted in the Joint Appendix at J.A. 97-117.

JURISDICTION

The opinion and judgment of the court of appeals were entered on August 17, 1982. *See* Chev. Pet. App., A-1 to A-20. Timely petitions for rehearing and suggestions for rehearing *en banc* were denied by orders of the court of appeals entered on October 27, 1982. *See* Chev. Pet. App., B-22 to B-25. The petition for a writ of certiorari in No. 82-1005 was filed on December 15, 1982; the petition in No. 82-1247 was filed on January 25, 1983. On January 21, 1983 the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 82-1591 to and including March 26, 1983; the petition was filed on March 25, 1983. The three petitions were granted and consolidated on May 31, 1983. Jurisdiction to

review the decision below is vested in this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves sections 101, 107, 110, 111, 171, 172, 173, and 302 of the Clean Air Act, as amended, 42 U.S.C. §§ 7401, 7407, 7410, 7411, 7501, 7502, 7503, and 7602 (Supp. IV). The pertinent portions of these statutory provisions are set forth in Appendix A to this brief. The regulations at issue are reprinted in the Joint Appendix at J.A. 97-117.

STATEMENT OF THE CASE

A. The Statutory Framework

The 1970 Clean Air Act[1] established a joint federal/state framework for protecting and enhancing air quality throughout the country. It directed the Environmental Protection Agency ("EPA") to establish national ambient air quality standards ("NAAQS") limiting the concentration of pollutants that would be permitted in the atmosphere.[2] Primary responsibility for attaining and maintaining those standards, however, was assigned to the states.[3] Within nine months after promulgation of a NAAQS, each state was required to develop and adopt a State Implementation Plan ("SIP" or

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[1] Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676, then codified at 42 U.S.C. § 1857 *et seq.* In 1977 the Act was further amended and, as amended, was recodified at 42 U.S.C. §§ 7401 *et seq.* (Supp. IV).

[2] Section 109, 42 U.S.C. § 7409. The original NAAQS for sulfur oxides (sulfur dioxide), particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons and nitrogen dioxide were promulgated on April 30, 1971. 36 Fed. Reg. 8186. Ambient air standards are now in effect for six pollutants: sulfur oxides, particulate matter, carbon monoxide, nitrogen oxides, photochemical oxidants (expressed as ozone), and lead. *See* 40 C.F.R. Part 50 (1982).

[3] Section 101(a)(3) and 110(a)(2), 42 U.S.C. §§ 7401(a)(3) and 7410(a)(2).

"state plan") incorporating such programs, measures and means as the state found necessary and sufficient to achieve compliance with the NAAQS by the statutory deadlines.[4] EPA was required to review these SIPs and to determine whether they met the requirements of section 110(a)(2), 42 U.S.C. § 7410(a)(2),[5] but as this Court made clear, the scope of that review was limited: so long as a plan, in its entirety, provided for timely attainment of the NAAQS, EPA had no authority to second-guess the mix of emission limits and other requirements by which the state chose to achieve that result. *Train v. NRDC*, 421 U.S. 60, 79-80 (1975).

Notwithstanding the adoption and implementation of SIPs by all of the states, not all areas of the country were in compliance with the NAAQS by the statutory attainment dates. To address the question whether industrial plants could be constructed or modified in such areas, EPA published in 1976 an "Emission Offset Interpretative Ruling" ("Offset Ruling") which required the states to conduct preconstruction review of, and to impose certain conditions upon, any major new "stationary sources" and any major modifications to existing "stationary sources" proposed to be constructed in an area exceeding a national ambient air quality standard.[6]

In addressing industrial growth issues in the 1977 Amendments to the Clean Air Act,[7] Congress preserved the Act's basic federal/state framework but required the states to incorporate several new elements in their SIPs both for those

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[4] Section 110(a)(1), 42 U.S.C. § 7410(a)(1).

[5] If a state failed to satisfy any of the requirements of section 110(a)(2), EPA could promulgate the necessary requirements in its own plan under section 110(c), 42 U.S.C. § 7410(c).

[6] 41 Fed. Reg. 55524 (December 21, 1976). Codified as Appendix S to 40 C.F.R. Part 51 (1982), interpreting new source review provisions set forth in 40 C.F.R. § 51.18 (1982).

[7] Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. §§ 7401 *et seq.* (Supp. IV).

areas meeting NAAQS (attainment areas) and those not meeting NAAQS (nonattainment areas). For attainment areas, Congress added a new Part C to Title I (Sections 160-169A, 42 U.S.C. §§ 7470-7479A), which provided for the prevention of significant deterioration ("PSD") of ambient air quality in those areas through preconstruction review and oversight of new industrial growth. The counterpart for nonattainment areas was a new Part D of Title I (Sections 170-178, 42 U.S.C. §§ 7501-7508), which Congress fashioned after EPA's 1976 Offset Ruling.

Part D requires the states, for each nonattainment area within their borders, to amend their SIPs to provide for attainment by new deadlines and for "reasonable further progress" toward attainment in the interim.[8] This goal is to be achieved (1) by implementation of all reasonably available control measures for existing sources, and (2) by adoption of such other requirements as are necessary to demonstrate reasonable further progress and attainment. Section 172(b)(2) and (3), 42 U.S.C. § 7502 (b)(2) and (3). In addition, each state must require a permit of any new "major stationary source" or any alteration to an existing "major stationary source" that would result in a net increase in emissions from that "source," before allowing construction to commence.[9]

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[8] Section 172, 42 U.S.C. § 7502. The Act defines "reasonable further progress" as "annual incremental reductions in emissions of the applicable air pollutant . . ." Section 171(1), 42 U.S.C. § 7501(1). This requirement precludes the states from deferring necessary emission reductions to the end of the statutory compliance period.

[9] Section 172(b)(6), 42 U.S.C. § 7502(b)(6). A "major stationary source" is any stationary facility or source of air pollutants which emits, or has the potential to emit, one hundred tons per year or more of any air pollutant. Section 302(j), 42 U.S.C. § 7602(j). The Act does not define what constitutes a "major" modification. EPA by regulation has defined as "major" those modifications which result in a "significant net emissions increase" of any pollutant. 40 C.F.R. § 51.18(j)(1)(v) (1982). EPA has specified the levels at which

The state may issue such a permit only upon a showing that:

(1) the increase in emissions from the new or modified major source will be more than offset by corresponding emission decreases in the area, or have already been accounted for by a growth allowance built into the state plan;

(2) the new or modified major source installs control technology to achieve the lowest achievable emission rate ("LAER") for such category of sources;

(3) the new source owner certifies that the other major sources it owns in the state are in compliance with the Act; and

(4) the state is carrying out its revised Part D state plan.

Section 173(1)-(4), 42 U.S.C. § 7503(1)-(4).

Following designation of an area as nonattainment, during the period the states are completing the required revisions to their SIPs, new source construction is governed by EPA's Offset Ruling, which imposes permit conditions similar to those that must be imposed under a Part D SIP. *See* 40 C.F.R. § 52.24(b) (1982); 40 C.F.R. Part 51, Appendix S (1982). If a state's Part D SIP has not been approved by EPA within the time allotted by the Act, section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I), precludes the construction or modification of any major "source" that will cause or contribute to a violation of the NAAQS in a nonattainment area.[10] This

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an increase is "significant" on a pollutant-by-pollutant basis. The "significance levels" currently in force are:

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

40 C.F.R. § 51.18(j)(1)(xiii) (1982).

[10] Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I).

prohibition is sometimes referred to as the "construction moratorium."[11]

B. EPA's Regulations Defining the Term "Source"

The Clean Air Act does not include a generally applicable definition of "source" in section 302, 42 U.S.C. § 7602, which sets forth definitions for use throughout the Act, or a specifically applicable definition in Part D for purposes of nonattainment review.[12] The principal issue in this case is whether EPA, in the absence of an applicable statutory definition, has discretion to define, and to allow the states to define, the term "source" as an industrial plant for purposes of preconstruction review under Part D of the Clean Air Act. This term is critical, for while the construction moratorium and permit programs apply both to new "sources" and modifications of existing "sources," a "modification" occurs only if there is a net increase in emissions from the "source" as a whole. Sections 111(a)(4) and 171(4), 42 U.S.C. §§ 7411(a)(4) and 7501(4). Thus, if "source" is defined as an industrial plant, process modifications or equipment changes within the plant will constitute neither new sources nor modifications so long as there is no significant net emission increase from the plant as a whole.

A plantwide definition of "source" allows plants to offset increased emissions from one unit or piece of equipment in the plant with an equal or greater contemporaneous decrease

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[11] *See, e.g.*, 46 Fed. Reg. 16280 (March 12, 1981).

[12] Subsection (a)(2) of section 111, 42 U.S.C. § 7411, relating to standards of performance for new sources, defines "stationary source" as a "building, structure, facility, or installation," but neither the Act nor its legislative history provides any firm guidance as to how those four component terms should be defined. Moreover, that definition by its terms applies only to that one section. *See* introductory language of section 111(a), 42 U.S.C. § 7411(a).

in emissions elsewhere in the plant,[13] and thereby to retain necessary flexibility to make process changes or plant improvements quickly with no threat to ambient air quality. In areas where EPA has imposed, or will impose, a new source construction ban, this definition will permit the modernization of our nation's industrial base by the replacement of obsolete facilities with modern and efficient facilities which have fewer emissions. If, on the other hand, "source" is defined as a piece of equipment, any addition or replacement of a piece of equipment with emissions in excess of 100 tons per year will be subject to review or prohibited, as will any alteration to such a piece of equipment which increases its emissions, even if plantwide emissions do not increase or actually decline.

1. EPA's Pre-1980 Regulatory Treatment of the Term "Source" in Nonattainment Areas

EPA's original 1976 Offset Ruling, upon which the new source review aspects of Part D are based, did not explicitly define "stationary source" or "source." EPA addressed this issue directly for the first time, in the wake of the 1977 Amendments to the Act, in January 1979 revisions to the Offset Ruling. 44 Fed. Reg. 3274 (January 16, 1979). In the preamble to the revised 1979 Offset Ruling, EPA employed the term "source" to refer to an entire *plant*, 44 Fed. Reg. 3276, but did not allow the netting of intra-plant emission increases and decreases in those states lacking approved Part D SIPs. Significantly, however, in those states with acceptable Part D SIPs, modifications of major sources in nonattainment

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[13] The netting of internal emission increases against internal emission decreases is an example of what is sometimes referred to as the "bubble concept." A source is treated as if it were under a "bubble" for purposes of determining its net emissions.

areas were not required to be subject to preconstruction review where there was no net emission increase from the plant as a whole. *Id.* at 3276-77. As EPA stated:

> Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER [lowest achieveable emission rate] and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions. Consequently, for a plan approved and implemented under Part D, it is acceptable for the State to include the above exemption for intrasource offsets in its new source construction under the State plan . . .

Id. at 3277.

2. EPA's 1980 Imposition of a "Dual" Definition of "Source" in Nonattainment Areas

In 1979 the court below, in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), vacated, *inter alia*, EPA regulations prohibiting the netting of emission increases and decreases for purposes of the PSD program under Part C of the Act.[14] Thereafter, EPA proposed new—and different—definitions of the term "source," one definition to be used for the Part C PSD program and also for approved Part D state plans and another definition to be used for the construction moratorium, the Offset Ruling and state plans not approved as meeting the requirements of Part D. 44 Fed. Reg. 51924

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[14] 43 Fed. Reg. 26380 (June 19, 1978).

(September 5, 1979). For purposes of Part C, EPA, at the direction of the *Alabama Power* decision, proposed to define a "source" for purposes of Part C as an industrial *plant.*[15] EPA indicated that it would also permit the states to adopt a similar definition of "source" where the overall state plan had been approved as meeting the requirements of Part D. Where a state Part D plan had not been approved, however, EPA proposed to define a "source" *both* as the industrial plant *and* as an individual piece of process equipment within the plant. 44 Fed. Reg. at 51956, 51958. EPA subsequently labelled this the "dual" definition of "source."[16]

As EPA's preamble discussion of its proposal made clear, the "dual" definition of "source" represented a substantial departure from EPA's prior policy of looking to the entire plant, and not to individual pieces of equipment within a plant, in determining whether or not a source must undergo preconstruction review. *See, e.g.*, 44 Fed. Reg. at 51931-2. EPA gave the following explanation for proposing two opposite definitions for the same statutory term:

> To assure adequate review of new plants, a large grouping must be subject to nonattainment NSR [new source review]. . . To do otherwise would allow a new plant that is divided into separate process units, each below the potential emission threshold, to escape review. New emissions could thus be added to the existing violation, without review, making attainment virtually impossible. Therefore, EPA believes that nonattainment programs, like PSD programs, must apply NSR to entire plants.
>
> EPA believes that pieces of process equipment within plants should also be subject to NSR under nonattainment programs. This would prevent use of plant-wide offsets for increases from construction or modification of major pieces of process equipment.

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[15] *See* 44 Fed. Reg. 51947-48 (proposed 40 C.F.R. § 51.24(b)(5)) and 44 Fed. Reg. 51931-32.

[16] *See, e.g.*, 45 Fed. Reg. 52696 (August 7, 1980).

Id. at 51932. EPA stated that, in determining whether preconstruction review would be required, the Agency would look to emission increases from each major piece of process equipment without considering contemporaneous emission reductions within the plant as a whole. *Id.*

Despite this policy change, EPA recognized that the states should have a voice in the matter and proposed to apply the "dual" definition of "source" *only* where a state had failed to submit an approvable Part D SIP. *See* 44 Fed. Reg. at 51933. States with approved Part D SIPs were permitted—and even encouraged—to employ a plantwide "source" definition if the SIP as a whole provided for reasonable further progress toward and attainment of the NAAQS. As noted by EPA:

> Use of only a plant-wide definition of source will permit plant-wide offsets . . . [which is] appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment . . . . If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment.

44 Fed. Reg. at 51933.

When EPA promulgated final PSD and nonattainment regulations on August 7, 1980 (45 Fed. Reg. 52676), the Agency dropped its proposal to allow states with approved Part D SIPs to adopt a plantwide definition of "source" and instead *required* all states to adopt the "dual" definition, regardless of whether the "dual" definition was necessary for the particular state to achieve attainment. EPA's sole justification was that its regulation would subject the maximum number of "sources" and internal modifications at major "sources" to new source review and to the permit requirements of Part D. 45 Fed. Reg. 52676, 52697 (August 7, 1980).

EPA's August 7, 1980 PSD and nonattainment regulations were challenged immediately in the court below and consolidated with *Chemical Manufacturers Association* v. *EPA*,

No. 79-1112 and consolidated cases (D.C. Cir. 1979) (*"CMA v. EPA"*).[17]

3. EPA's Return to a Plantwide Definition of "Source"

On March 12, 1981 EPA proposed to replace its "dual" definition of "source" with a plantwide "source" definition identical to the Part C "source" definition. 46 Fed. Reg. 16280.[18]

At 46 Fed. Reg. 16281, EPA gave seven reasons for its return to a plantwide "source" definition:

1. The "dual" definition, which makes it costly and time consuming to undergo an equipment or process change, "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities."

2. The "dual" definition prohibits the construction or modification of major pieces of process equipment in a "substantial number" of areas where the construction moratorium had taken effect (because no Part D SIP had been approved),

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[17] The CMA v. EPA case commenced with challenges to EPA's 1979 revised Offset Ruling, 44 Fed. Reg. 3274 (January 16, 1979). Briefs challenging the legality of certain provisions in the August 1980 regulations, including the "dual" definition of "source," were filed on February 12, 1981. Shortly thereafter, EPA requested and was granted a deferral of further briefing pending the outcome of settlement discussions. The negotiations resulted in a settlement agreement which was filed with the court below on February 22, 1982. Further proceedings in CMA v. EPA have been deferred pending implementation of the settlement agreement. Neither the negotiations nor the settlement agreement addressed the "dual" source definition, which was the subject of further rulemaking proceedings commencing with EPA's March 12, 1981 Federal Register proposal. *See* text immediately following.

[18] EPA also proposed to delete its requirement that "reconstructed" facilities in nonattainment areas undergo new source review as if they were new sources. 46 Fed. Reg. at 16281. *See* discussion *infra* at 15–17.

even though no overall increase in emissions at the plant would result.

3. For the above reasons, the dual definition can "actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones."

4. The plantwide definition would simplify EPA's rules by utilizing a uniform definition of "source" for the PSD, nonattainment, and construction moratorium programs and, thereby, would reduce "confusion and inconsistency."

5. Since the states remain subject to the requirement that they demonstrate attainment of the NAAQS for all nonattainment areas as expeditiously as practicable and show reasonable further progress towards attainment, deletion of the mandatory "dual" "source" definition "should not interfere with the fundamental purpose of Part D of the Act."

6. Under Section 111 of the Act, 42 U.S.C. § 7411, new source performance standards "will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review."

7. Review would continue to be required where overall emissions from the plant increase above *de minimis* levels, thereby protecting air quality.

EPA concluded that, in light of the above considerations, the "dual" definition was "excessively and unnecessarily burdensome," 46 Fed. Reg. at 16281, and proposed to delete it. As stressed by EPA, and as pointed out in number 5 above, EPA would carefully scrutinize any state's deletion of the "dual" definition of "source" to determine that the state's Part D SIP would still ensure reasonable further progress and attainment of the NAAQS.

On October 14, 1981 EPA announced its decision to adopt the plantwide definition of "source" as proposed and reported that of the 81 comments it had received, "the majority . . . favored deletion of the dual definition." 46 Fed. Reg. 50767. Having evaluated these comments, EPA concluded that two

principal concerns warranted this approach to Part D new source review:

> First, today's action means that both the PSD and nonattainment programs will use the same definition of "source." This alone will reduce regulatory complexity. Sources will no longer have to figure out what an "installation" is, which should lessen any confusion engendered by EPA's August 7 rules.
>
> Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution control. Sections 101(a)(3), 101(b). It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. *See, e.g.*, Sen. Rep. 95-127 at pp. 10-11; *cf. NRDC* v. *Train*, 421 U.S. 60 (1975). Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment NSR [new source review] programs and attainment demonstrations. *Since demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D.*

Id. at 50767 (October 14, 1981) (emphasis added).

NRDC challenged the revised regulations in the court below in *NRDC v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982). The court of appeals concluded that neither the Act nor its legislative history determined the scope of the term "source," 685 F.2d at 723, Chev. Pet. App. at A-8, but held itself "compelled" to strike down EPA's definition of "source" as *per se* invalid on the sole basis of an alleged "bright line" drawn, in its view, by other panels of that court in two prior cases involving air quality. 685 F.2d at 726-27, Chev. Pet. App. at A-16 to A-17. The court held that *ASARCO, Inc. v. EPA*, 578 F.2d 319 (1978), and *Alabama Power Co. v. Costle*, 636 F.2d 323 (1979), together drew an uncrossable line between programs designed to "improve" air quality, for

which a single plantwide "source" definition is *precluded*, and programs that only "maintain" air quality, for which a single plantwide "source" definition is *required*.[19] 685 F.2d at 720, 725-6, Chev. Pet. App. at A-2 to A-3, A-14 to A-15.

The court below did not remand, but vacated EPA's October 14, 1981 regulations deleting the "dual" "source" definition. The court also denied petitioners' timely petition for rehearing and suggestion for rehearing *en banc*. Chev. Pet. App. at B-24, B-25. In a subsequent case, the court cited the decision below as "implicitly assuming that EPA will return to its previous regulation defining 'source' under the Clean Air Act." *See Small Refiner Lead Phasedown Task Force v. EPA*, ____ F.2d ____, 18 Env't Rep. Cas. (BNA) 1681, 1682 (D.C. Cir. 1983).

C. EPA's Deletion of the "Reconstruction" Provision

EPA's August 7, 1980 regulations adopting the "dual" "source" definition also included a provision which subjected "reconstructions" of existing sources in nonattainment areas to the Part D preconstruction requirements and the construction moratorium. A "reconstruction" was deemed to occur when components of a source worth more than 50% of the capital cost of the source were replaced, regardless of whether this caused a net increase (or decrease) in emissions.[20]

The 1976 Offset Ruling had not mentioned or provided for special treatment of "reconstructions."[21] EPA first applied the reconstruction concept to new source review in nonattainment areas in the January, 1979 amendments to the 1976

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[19] As the court below stated, "We express no view on the decision we would reach if the line drawn in Alabama Power and ASARCO did not control our judgment." 685 F.2d at 720 n.7, Chev. Pet. App. at A-4 n.7.

[20] *See* 45 Fed. Reg. 52742 (August 7, 1980) (former 40 C.F.R. § 51.18(j)(1)(ix) (1981)).

[21] The 1976 Offset Ruling defined the terms "major source" and "major modification" but not "reconstruction." *See* 41 Fed. Reg. at 55528.

Offset Ruling. 44 Fed. Reg. 3274, 3282 (January 16, 1979). EPA provided no justification in the preamble for inclusion of a "reconstruction" provision.[22] On September 5, 1979, EPA proposed to include the "reconstruction" definition in its regulations implementing both Parts C and D, 44 Fed. Reg. 51924, and, again, offered scant justification. *See, e.g.*, 44 Fed. Reg. at 51933, 51933 n.8. In its final August 7, 1980 rules, EPA deleted the reconstruction provision from the Part C PSD regulations but included it in the Part D regulations. The reconstruction provision was also challenged and briefed by the industry petitioners in the *CMA v. EPA* case (see pp. 11–12, *supra*).

In its Federal Register notice proposing to delete the "dual" definition of "source," EPA also proposed to delete the "reconstruction" requirement. 46 Fed. Reg. 16280 (March 12, 1981). As noted by EPA, in light of the proposal to adopt a plantwide definition of "source":

> [T]here is good reason to abandon the "reconstruction" test for nonattainment area new source review. That test by itself only requires review in cases where there is reconstruction, but a "significant" increase in emissions is absent. With a plant-wide definition of source, the reconstruction provision would only trigger review in cases of plant-wide reconstruction. Few instances of plant-wide reconstruction are expected. Thus, there is little justification for the added complexity this provision entails. Moreover, this change will further reduce inconsistency with the PSD rules which do not have a reconstruction provision.

46 Fed. Reg. 16281.

After it received and considered public comments, EPA took final action deleting the "reconstruction" provision, 46 Fed. Reg. 50766 (October 14, 1981), citing the same rationale

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[22] EPA merely explained how the provision would work, stating that reconstructions would not be defined using the "net increase" calculation required by the Act's definition of "modification," but instead would be defined by a "50% cost test," for which it cited no statutory basis. *See* 44 Fed. Reg. 3277.

it had provided in its proposal. *See* 46 Fed. Reg. at 50767. NRDC also challenged this EPA action in the court below. The court below vacated EPA's deletion of the reconstruction rule as "ancillary" to the vacated plantwide "source" definition. 685 F.2d at 728, Chev. Pet. App. at A-19 to A-20.

SUMMARY OF ARGUMENT

1. As this Court has made clear in *Train v. NRDC*, 421 U.S. 60, 70–90, 86–87 (1975), and *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976), the Clean Air Act places the primary responsibility for determining the mix of controls necessary to attain and maintain national ambient air standards with the states. The decision below severely limits state flexibility to choose the most efficient and cost-effective mix of controls necessary to achieve reasonable further progress and attainment. This intrusion into an area of discretion Congress reserved to the states also contravenes Congress's intent in the 1977 Amendments to *increase* the states' flexibility in tailoring implementation plans to their particular circumstances.

2. The court below concluded that neither the Clean Air Act nor its legislative history clearly indicates how Congress intended the term "source" to be defined for purposes of Part D. Given that conclusion, EPA's judgment that a plantwide definition best serves the various purposes underlying Part D was entitled to substantial deference. The court did not accord this deference to EPA, but instead invalidated EPA's judgment on the basis of a simplistic characterization of both the Act and the purposes of Part D. This Court held in *Train v. NRDC*, 421 U.S. at 87, that EPA's interpretations of the Act, if reasonable, "preclude the Court of Appeals from substituting its judgment for that of the Agency." The plantwide definition of "source" admirably balances Congress's three primary purposes in enacting Part D: (1) to ensure that reasonable further progress and timely attainment be achieved, (2) to ensure reasonable economic growth in nonattainment areas, and (3) to provide the states with flexibility for developing their strategies for nonattainment

areas. EPA's adoption of a single, administratively feasible definition of "source" consistent with the goals of the Act was reasonable, and should not have been overturned.

3. The court below also erred in vacating EPA's deletion of the provisions of its 1980 regulations which treated a "reconstruction" of an existing source as a new stationary "source" when "the fixed capital cost of the new components exceeded 50 percent of the fixed capital cost of a comparable entirely new statutory source." This "reconstruction" concept is nowhere to be found in the Clean Air Act. Moreover, since "reconstructions" typically result in an air quality improvement, and make existing sources cleaner, more economical to operate, and more energy-efficient, EPA acted reasonably in removing the obstacles to those activities.

4. By emphasizing the absence of any "study, survey, or support" demonstrating aggregate air quality benefits resulting from application of the plantwide definition of "source," the court below incorrectly imposed on EPA an unduly high burden of justification for rescission of the "dual" definition of "source." This emphasis was particularly improper because EPA had produced no "study, survey, or support" for the "dual" definition. By imposing this burden, the court below unduly limited the range of factors that EPA could consider, and, in so doing, disregarded virtually all of the administrative record that supported the rescission. The court's interference with EPA's exercise of its statutory discretion hinders that agency's ability to change rules under changing circumstances and impermissibly expands the standard of judicial review applicable to informal rulemaking, contrary to this Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, _____U.S. _____, 51 U.S.L.W. 4953 (1983), and earlier decisions, notably *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978).

ARGUMENT

I. THE DECISION BELOW CONTRAVENES THE CLEAN AIR ACT AND DECISIONS OF THIS COURT BY DENYING EACH STATE THE RIGHT TO SELECT ITS PREFERRED MIX OF REMEDIAL MEASURES FOR ATTAINING AMBIENT AIR STANDARDS

EPA's October 14, 1981 regulations did nothing more than *allow* the states to use a plantwide "source" definition in the new source review program that each state is required to include in its Part D plan, *if* the overall Part D plan, including that definition, would ensure timely attainment of the national ambient air quality standards and reasonable further progress in the interim. In striking down this provision of the regulations, the court below precluded a plantwide definition in *any* state plan. This holding is inconsistent with the Congressional determination that *states*, not EPA (and certainly not the courts of appeals), should have primary responsibility for determining how air quality standards should be achieved.[23] It also conflicts with the decisions of this Court in *Train v. NRDC*, 421 U.S. 60, 79–80, 86–87 (1975) and *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976). In both of those cases, this Court held that EPA *must* approve the mix of emission strategies selected by a state so long as the state plan as a whole provides for timely attainment of the standards. Finally, the decision below is contrary to Congress's expressed intent, with regard to Part D, that:

> the State may choose whatever mix of continuous emission reduction measures and strategies it wants to meet the requirements of this section.

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[23] *See* section 101(a)(3), 42 U.S.C. § 7401(a)(3) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."), and section 107(a), 42 U.S.C. § 7407(a) ("[T]he prevention and control of air pollution at its source is the primary responsibility of States and local governments").

H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 213 (1977), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977, at 2680 (hereinafter referred to as "1977 Legislative History").

The statutory requirements governing the contents of SIPs are set forth at section 110(a)(2), 42 U.S.C. § 7410(a)(2). This provision "quite clearly mandates approval of any plan which satisfies its minimum conditions." *Train v. NRDC*, 421 U.S. at 71 n.11. Elaborating on EPA's limited review authority and the states' considerable discretion to fashion specific SIP requirements, this Court described the Act's "division of responsibilities" as follows:

> [EPA] is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. [Footnote omitted.] Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. . . . Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Id. at 79. (emphasis in original).

In *Union Electric*, this Court reaffirmed its view that EPA lacked authority to disapprove SIPs, other than as explicitly provided in section 110(a)(2):

> The provision [§ 110(a)(2)] sets out eight criteria that an implementation plan must satisfy, and provides that *if these criteria are met* and if the plan was adopted after reasonable notice and hearing, *the Administrator "shall approve" the proposed state plan*. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified [citing *Train v. NRDC*]. . .

427 U.S. at 257 (emphasis added).

In enacting the 1977 Amendments, Congress *increased* the

states' flexibility to tailor implementation plans to their particular circumstances so long as attainment and reasonable further progress toward attainment was assured. As stated in the House Report, one of the two main purposes of Part D was "to *allow States greater flexibility* [in allowing reasonable economic growth in nonattainment areas while assuring attainment of the NAAQS] than EPA's present interpretative regulations afford."[24]

The 1977 Senate Report reflects Congress's recognition that NAAQS attainment decisions must be made at the state and local level:

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. *States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare, prevent discrimination among States, protect national resources within States, and provide guidance on the technical and the economic implications of various national policies.*
>
> *The problem of air pollution exists at the State and local level. That is where the public understands the problem. That is where the resources must be directed.* The Federal Government has a responsibility to provide support for those regulatory activities, but it need not have an actual presence in all regulatory activities.

S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977), *reprinted in* 1977 Legislative History, at 1384 (emphasis added).

As with SIP approvals under section 110(a)(2), EPA is *required* to approve nonattainment SIPs meeting the require-

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[24] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 211 (1977), *reprinted in* 1977 Legislative History, at 2678. (emphasis added). The preconstruction permit program for new and modified sources in nonattainment areas was taken primarily from the House bill. *See*, Conference Report, H.R. Rep. No. 95-564, 95th Cong., 1st Sess. at 157-58 (1977), *reprinted in* 1977 Legislative History, at 381 *et seq.*

ments of that section and Part D. Nowhere in section 110(a)(2) or Part D is there a command that the states adopt a particular definition of "source" in their permit programs. Nor do these provisions require review of alterations to existing plants which result in no net increase in plantwide emissions, if a state's chosen definition of "source" does not prevent its Part D SIP from achieving reasonable further progress and attainment. The "how" of achieving attainment or reasonable further progress is left to the states, and the states' choices are not to be second-guessed by EPA or the courts. The decision of the court below, however, reimposes the "dual" definition, without regard to whether it is necessary for attainment of ambient air standards and denies the states the flexibility this Court in *Train* and *Union Electric* has found that Congress intended them to have.

II. THE COURT BELOW IMPERMISSIBLY SUBSTITUTED ITS JUDGMENT FOR EPA'S REASONABLE CONSTRUCTION OF THE CLEAN AIR ACT

After reviewing the language and legislative history of Part D, the court below concluded:

> Part D, dense as it is, does not explicitly define what Congress envisioned as a "stationary source" to which the permit process and construction moratorium should apply. Nor is the issue squarely addressed in the legislative history.

685 F.2d at 723, Chev. Pet. App. at A-8. Having so determined, the court below should have deferred to EPA's regulatory interpretation of that term. This Court has recognized that the Clean Air Act is a complex and often ambiguous statute and that, if EPA's construction of the Act is "sufficiently reasonable," it must be upheld:

> We therefore conclude that the Agency's interpretation of §§ 110(a)(3) and 110(f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this

> conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that *its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.* [Citation omitted.]

Train v. NRDC, 421 U.S. at 87 (emphasis added).

The question Congress faced in developing the nonattainment sections of the 1977 Amendments to the Clean Air Act was not simply how to reduce emissions in nonattainment areas, but how to do so without crippling economic growth and vitality. As was stated in the House Report,

> [T]he fact that a substantial number of regions did not attain one or more of the standards on time posed a dilemma for the committee. On the one hand, protection of the public health remains the predominant goal of the Clean Air Act and the committee. . . . On the other hand, a complete prohibition on new growth or expansion in nonattainment regions would pose very serious problems. . . . In order to reconcile these conflicting concerns, the committee adopted section 117 of the bill. *The purpose of the provision is to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act.*

H.R. Rep. 95-294, 95th Cong., 1st Sess. at 208-210 (1977), *reprinted in* 1977 Legislative History, at 2675-77 (emphasis added).

The multiplicity of purposes underlying Part D was reaffirmed later in the same report.

> The section has two main purposes: (1) to allow reasonable economic growth to continue while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow states greater flexibility for the former purpose than EPA's present interpretative regulations afford.

Id. at 211. Judged against these purposes, each of which is discussed in more detail in the next two sections, the plantwide definition of "source" is plainly a reasonable interpretation of the Act.

A. The Plantwide Definition of "Source" Allows and Encourages Reasonable Economic Growth Consistent with Reasonable Further Progress toward Attainment

The major advantage of the plantwide definition of "source" is precisely that it does implement Congress's intent to allow growth and modernization in nonattainment areas consistent with reasonable further progress toward and attainment of ambient air standards. EPA's decision to adopt and to allow the states to adopt the plantwide definition, and thereby to allow a bubble-type netting of intra-plant emission increases and decreases,[25] is more than "sufficiently reasonable" to be sustained.

The bubble concept is widely recognized as one of the most efficient cost-effective and anti-inflationary means of controlling air pollution.[26] Netting intra-plant emissions gives plant

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[25] The plantwide definition would allow a plant owner or operator to replace an obsolete, energy-intensive boiler which emits 120 tons of particulate matter per year with a new energy-efficient boiler which emits 105 tons of particulate matter per year without first obtaining a permit. Under EPA's prior "dual" definition of "source" the new boiler would be deemed a new source for which a permit is required, even though emissions from the overall plant would decrease by 15 tons per year. The new boiler, in any event, is subject to stringent emission controls specified in new source standards of performance applicable under section 111 of the Act. *See* 42 U.S.C. § 7411. What is especially ironic under the "dual" definition is that, in areas in which the new source construction ban is in effect, the older boiler could not be replaced and would continue to add 15 tons of avoidable emissions to the atmosphere.

[26] In an editorial commenting upon EPA's first adoption of an air pollution bubble policy, one aimed at giving existing plants greater

operators the flexibility to install tighter controls where costs are lowest and lesser controls where costs are highest. Consequently, netting encourages plant owners and operators to apply their know-how and ingenuity to develop improved methods for controlling air pollution so that, for any given commitment of resources, more pollution control can be accomplished.

Imposition of the "dual" definition, on the other hand, seriously dampens industry's incentive and ability to modernize existing plants and to upgrade process equipment in

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flexibility in meeting clean air requirements in state plans, the *Washington Post* stated: "EPA deserves congratulations for that governmental rarity—a creative and practical new idea." WASHINGTON POST, Dec. 10, 1979, at A26. Similarly, the *New York Times* stated: "The bubble is so sensible an idea that one wonders why it took so long to surface." NEW YORK TIMES, Dec. 6, 1979, at A30. *See also EPA and Industry Pursue Regulatory Options*, SCIENCE, Feb. 20, 1981, at 796-98. Another commentator cited the following example of how the "bubble" would work at an existing plant:

> Until recently, E.I. du Pont de Nemours & Co. was slated to spend a staggering $26 million to meet clean air standards at its Chambers, N.J., chemical plant. But under a new regulatory scheme developed by the Environmental Protection Agency, du Pont's compliance bill could be pared to just $6.5 million, and still total plant emissions *would be reduced a full 89%*, five percentage points more than under the costlier plan.

New Ways to Short Cut Costly Rules, DUN'S REVIEW, Feb., 1980, 62 (emphasis added). *See generally* National Commission on Air Quality, *To Breathe Clean Air*, 2.1-84, 4.1-36-37 (1981). The National Commission on Air Quality later stated with regard to use of the bubble concept in the Part C program:

> The bubble policy offers companies a strong incentive to reduce emissions from existing facilities in order to modernize without triggering [prevention of significant deterioration] review. While there are not sufficient data to quantify the influence of the bubble policy on total emission levels, the consensus of regulators and industry is that it has led to significant reductions. . . .

Id. at 3.5-48 (citation omitted).

nonattainment areas.[27] It takes months, sometimes years, to secure a permit to construct, and the combined direct costs and indirect costs (through delay of undergoing review) may well be prohibitive. These problems are particularly acute in the steel, chemical, automobile and petroleum industries in which the plants are often complex, integrated facilities which undergo constant modifications in response to market demands for their products. A basic chemical manufacturing plant, for example, typically has numerous processes and may manufacture up to fifty separate products.[28]

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[27] Petitioner United States Steel Corporation reported the following experience with the application of the "dual" definition to its Fairfield, Alabama integrated steel-making facilities:

> The Fairfield plant was "modernized" by installation of clean iron, steel and coke-making facilities and retirement of old facilities at a cost of over $350 million, including $20 million for pollution control facilities. The modernization project demonstrably reduced overall plant emissions from 60,876 tons per year to 3,962 tons per year, a reduction of 93%. Air quality, as measured at the nearest monitor point, improved dramatically. Nevertheless, EPA applied the "dual" definition of "source" to the modernization project, and, two years after construction began, required the installation of additional control facilities to meet lowest achieveable emission rate (LAER) requirements. Resolution of this issue delayed startup of the facilities for six months. An additional $33 million was spent on the LAER controls and other controls on existing facilities which were required by EPA. There was no measurable air quality improvement as a result of these additional controls. The plant could have installed controls on the existing facilities in lieu of modernization and avoided these new source problems. However, the emission reduction which would have resulted from this approach would have been only 80%, and the old facilities, with the attendant problems of age, would have remained. In effect, as a result of the "dual" definition of "source," the plant was penalized for improving its facilities and achieving greater reductions.

[28] Even plants that manufacture one basic type of chemical product, *e.g.*, synthetic rubber or transportation and heating fuels, require numerous processes to produce different grades of that product for widely varying uses or consumer specifications.

Process changes at such plants must occur frequently if the plant is to respond to market demands and technological developments and remain competitive in domestic and international markets. Products are constantly being modified and improved. New uses and markets for existing products are sought, and new products are introduced. As a result, at any given time a plant might shut down one or more processes due to slack demand, while modifying or adding new processes to increase production capacity for existing products or to manufacture new products. In addition, processes are changed to produce products more economically, to conserve energy and other resources, or to reduce pollution.[29]

A definition of "source" which requires preconstruction review of (or, if the construction moratorium applies, prohibits) any construction or alteration of any major piece of process equipment within the plant whether or not emissions increase destroys a plant's flexibility to respond quickly and

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[29] As recognized by the court below in *Alabama Power*:

> It is important first to recognize *that alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands.* This dynamic aspect of American industry was not disputed by the parties. To apply the second construction [precluding application of the "bubble" concept to the Part C PSD program], however, would require PSD review for many such routine alterations of a plant; a new unit would contribute additional pollutants, these increases could not be set off against the decrease resulting from abandonment of the old unit, and thus the change would become a "modification" subject to PSD review. *Not only would this result be extremely burdensome, it was never intended by Congress in enacting the Clean Air Act Amendments.*

636 F.2d at 401 (emphasis added). This "dynamic aspect of American industry" does not change merely because a plant is located in a nonattainment area. Nor is it any less burdensome for such sources to undergo preconstruction review for the hundreds of routine modifications that keep a plant productive and competitive.

effectively to market demands.[30] It also impairs the incentive to upgrade older, dirtier equipment.[31] In other cases plants can be precluded from using more economical, readily available domestic energy sources.[32] This not only forces up costs, but substantially increases the risk that the market demand prompting the modification will have disappeared or have been satisfied by domestic or foreign competitors.

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[30] *See, e.g.*, Comments of Merck Chemical Manufacturing Division, contained in the Appendix filed below (C.A. App.) as part of the certified record in CMA v. EPA, C.A. App. 90, which pointed out that delays in the pharmaceutical industry in obtaining permits not only can result in losing business abroad, but also can result in substantial delays in making necessary new drugs available in the American market.

[31] *See, e.g.*, Comments of Crown Zellerbach, J.A. 131, which pointed out that the bubble concept would make it possible to add a flexographic printing press without using expensive and energy-consuming additional equipment. Because of its productivity, this new press could be operated under a bubble regimen at maximum operating hours, yet at the same time decrease total plant emissions. *See also* Comments of American Textile Manufacturers Institute, Inc., J.A. 133.

[32] *See, e.g.*, Comments of Union Oil Company of California, C.A. App. 153; Chevron U.S.A., C.A. App. 162 (inability to "bubble" emissions results in inability to build major new refinery project that will decrease emissions and energy consumption and lessen U.S. dependence on foreign oil); Louisiana-Pacific Company, J.A. 118 (plantwide definition would permit replacement of old chemical recovering furnaces with new well-controlled furnaces, resulting in "greatly reduce[d]" emissions and a savings of 500,000 barrels per year of imported oil); Congressman George Miller, J.A. 135 (power plant unable to install two waste wood-fired boilers to replace oil-fired boilers in absence of plantwide "source" definition). *See also* the Comments of the Department of Energy, which has actively supported the plantwide "source" definition as the most economical and energy-efficient means of development in nonattainment areas. C.A. App. 115, 374.

B. The Plantwide Definition of "Source" Gives States the Flexibility to Manage their Emissions in the Most Efficient and Cost-Effective Manner

The final purpose which Congress sought to further in the programs for nonattainment areas was to increase state flexibility. It cannot be reasonably disputed that the regulations at issue here further that purpose. They permit the states to use a plantwide "source" definition and to obtain the substantial administrative and economic benefits which flow from that definition where attainment and reasonable further progress can be demonstrated. The court below deprived the states entirely of this flexibility.

Numerous commenters, including a number of the states, pointed out that a plantwide definition of "source" was *not* inconsistent with the purposes of Part D.[33] These states demonstrated that the "dual" definition of "source" will do nothing to expedite reasonable further progress toward attainment. To force these and similarly situated states to adopt a "source" definition inconsistent with their internal emission management needs would contradict the Congressional declaration, in enacting Part D, that "the State may choose whatever mix of continuous emission reduction measures and strategies it wants to meet the requirements of this section."[34]

Moreover, as various states commented to EPA, the "dual" definition has substantial practical and administrative disadvantages.[35] In contrast, the plantwide definition is easily

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[33] *See* Comments of the Arizona Department of Health Services, J.A. 136, Comments of the New York State Department of Environmental Conservation, J.A. 128, and Comments of Ohio EPA, J.A. 138. *See also* the affidavit of Milton Feldstein of the California Air Resources Board, J.A. 162.

[34] H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 213 (1977), *reprinted in* 1977 Legislative History, at 2680.

[35] *See, e.g.*, the Comments of the Virginia State Air Pollution Control Board, pointing out that EPA's "confusing and complex mess of different definitions" results in a situation that is unman-

understood and administered. In virtually every case, common sense notions of what constitutes a "plant" will correspond to the Agency's definition of "source." The "dual" definition, however, which in part employs an equipment-based approach, requires the reviewing authority and the source to make difficult, and at times meaningless, distinctions among pieces of equipment of different sizes.[36] The plantwide definition thus provides far more certainty and can be understood and acted upon by plant-level personnel without having to obtain concurrences from various agencies or legal counsel.

The plantwide definition of "source" also brings a measure of uniformity to the Clean Air Act's two major air quality-based new source review programs. A plantwide definition is used in the PSD program, which applies in attainment areas. Utilization of a single definition for both the Part C and Part D programs will, as EPA has noted, reduce "confusion and inconsistency." 46 Fed. Reg. 16281 (March 12, 1981).

The plantwide definition spares the states from having to review changes that have no significant impact on air quality. Under the "dual" definition, the state and the source owner or operator must go through a permit proceeding even if overall emissions from the plant as a whole decrease. By allowing states to focus only on changes which are important from an air quality perspective (*i.e.*, those which result in a

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ageable given available resources. C.A. App. 79-83. The Alabama Air Pollution Control Commission similarly expressed concern at the vast amount of "red tape" created that results in no benefit to air quality. C.A. App. 73-78.

[36] For example, in a household appliance or automobile paint shop is each painting booth a "source," or are groups of booths painting the same item on an assembly line the "source," or is the entire assembly line the "source"? Are individual coke ovens "sources" or is the coke oven battery the "source"? Is a conveyer belt bringing raw materials or intermediate materials to a process that is a "source" part of that "source" or a separate "source"?

significant increase in emissions), the plantwide definition assures that a permit program is not overburdened with meaningless reviews of permit applications that drain industry and state resources without benefitting air quality.

Under the challenged regulations, the states are not required to adopt the plantwide definition of "source," but they have the discretion to do so. The great majority of states, which do not rely on or need a "dual" definition of the term "source" to demonstrate reasonable further progress or attainment, should not be precluded from adopting the plantwide definition for new source review.[37]

The primary goal of Part D is the attainment of NAAQS by specified dates. Congress intended that the states have flexibility in meeting this goal. The only inflexible requirement is that a state must be able to demonstrate that its Part D plan will attain this goal. The plantwide definition of "source" is neither required nor prohibited—and is acceptable where its use does not prevent attainment of the NAAQS. EPA's decision in October, 1981 to cut the "red tape" and to allow states to make their own emission management decisions, consistent with reasonable further progress and attainment, was a reasonable exercise of its discretion under Part D. The court below wrongfully deprived EPA of that discretion and impermissibly substituted its policy judgment for that of EPA.

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[37] Given the opportunity, many states embraced the additional flexibility provided by EPA's plantwide definition of "source." As EPA pointed out in its motion in the court below to stay issuance of the mandate, within one year of the promulgation of the plantwide definition (*i.e.*, by Oct. 14, 1982) eighteen states had adopted new source review programs based upon the amended rules. Respondent's Motion to Stay Issuance of the Mandate, at 2, NRDC v. Gorsuch, No. 81-2208 (D.C. Cir. motion filed November 2, 1982). Thirteen more states were in the process of revising their new source review programs in accordance with the regulations struck down by the court below. *Id.* n.1.

III. EPA'S DELETION OF THE RECONSTRUCTION PROVISION WAS PROPER AND SHOULD NOT HAVE BEEN VACATED BY THE COURT BELOW

EPA's August 7, 1980 regulations had imposed a "reconstruction" requirement upon the states for nonattainment areas but not for PSD areas. Those regulations deemed a "reconstruction" to have taken place when "the fixed capital cost of the new components exceed[ed] 50 percent of the fixed capital cost of a comparable entirely new stationary source." *See, e.g.*, 45 Fed. Reg. 52744 (formerly 40 C.F.R. § 51.18(j)(1)(ix) (1981)). Although plants normally undertake reconstructions or rehabilitations of existing sources to maintain existing capacity, not to expand capacity, EPA deemed reconstructed stationary sources to be subject to nonattainment area preconstruction review and to the necessity of obtaining a permit in the same manner as a new stationary source. *Id.*

Petitioners challenged these provisions in *CMA* v. *EPA* (see pp. 11–12, *supra*) because they treat existing source modifications the same as the construction of new sources. The "reconstruction" concept is nowhere to be found in the Clean Air Act. Part D does not define "reconstruction" and defines modifications in terms of emissions, not dollars. A "modification" triggering new source review, as defined in section 111(a)(4) of the Act, 42 U.S.C. § 7411(a)(4), and expressly incorporated for purposes of Part D of the Act by section 171(4), 42 U.S.C. § 7501(4), occurs only where (1) there is a physical or operational change in an existing source, and (2) that change results in a net increase in emissions.[38]

The "reconstruction" provision imposed by EPA's August 7, 1980 regulations subjected to new source review modifications categorized by EPA as "reconstructions" even though a net emission decrease, not an increase, may have resulted. In effect, EPA substituted a 50% replacement cost test—a concept foreign to Part D and unrelated to air quality—for the second prong of the "modification" definition. EPA lacks

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[38] *See, e.g.*, Alabama Power, 636 F.2d at 399–403.

authority to extend the coverage of the Act or to redefine statutory terms to eliminate the statutory requirement that a physical change must cause an increase in emissions before it can be subjected to the nonattainment area review requirements as a "modification."

As EPA pointed out in withdrawing the reconstruction test for modifications, that test would be virtually meaningless following adoption of a plantwide definition of "source" because, practically speaking, few whole plants will be reconstructed. The court below vacated EPA's deletion of the reconstruction rule on this ground, stating that it was "ancillary" to EPA's adoption of the plantwide definition of "source," which the court also had vacated. 685 F.2d at 728, Chev. Pet. App. at A-19 to A-20. Petitioners submit that the court below should have upheld EPA's decision to delete the reconstruction rule, whether or not the court upheld the plantwide definition, because, as noted above, there is no statutory basis for the rule. If the validity of EPA's action deleting the reconstruction rule is tied to the plantwide definition of "source," however, as the court below asserted, this Court's validation of the plantwide "source" definition will also validate EPA's decision to delete the reconstruction rule. *See, e.g.*, 46 Fed. Reg. 50767.

EPA also gave as a basis for its October, 1981 action the need to make the PSD and nonattainment regulations the same with regard to "reconstruction." *See* 46 Fed. Reg. 50767. The lack of uniformity between the treatment of "reconstruction" in the Part C and Part D new source review programs had resulted in confusion, unwarranted complexity, needless delay and unnecessary compliance and regulatory costs in the new source review process.[39] Since "reconstructions" typically

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[39] *See, e.g.*, Comments of Southern Calif. Gas Co. at 2, C.A. App. 148; Air Products and Chemicals, Inc., C.A. App. 127; Pennzylvania Power & Light Co., C.A. App. 130; SOHIO, C.A. App. 140; Inland Steel Corp. at 2-4, C.A. App. 144-46; Texas Eastern Transmission Corp. at 1, C.A. App. 179; Owens-Illinois, C.A. App. 141.

result in an air quality improvement, and generally make existing sources cleaner, more economical to operate, and more energy-efficient, EPA acted reasonably to remove the new source review requirements. In light of these legitimate concerns, EPA properly exercised its discretion by deleting the "reconstruction" provision.

IV. THE COURT BELOW IMPOSED ON EPA AN UNDULY HIGH BURDEN OF JUSTIFICATION FOR RESCISSION OF A RULE

The court below faulted EPA for failing to cite "any study, survey, or support" for its position that the "dual" definition would retard improvement of air quality in the aggregate, noting that EPA had taken the very opposite position in adopting the "dual" definition in August 1980. 685 F.2d at 727 n.41, Chev. Pet. App. at A-18 n.41.

In emphasizing the absence of any "study" or "survey" to support the plantwide definition, the court below ignored the fact that there is no "study, or survey, or support" for the "dual" definition. More fundamentally, in so doing, the court below unduly narrowed the range of factors EPA could consider and intruded on EPA's discretion under the Clean Air Act. This led the court below to disregard the great majority of the eighty-one public and state comments that presented strong support for EPA's proposals to rescind the "dual" definition of "source." *See* 46 Fed. Reg. at 50766, 50767-68.

By thus limiting the administrative record upon which EPA could rely and suggesting that EPA must produce a "study" or "survey" not required for the original rule, the court below expanded the scope of its judicial review in a way that this Court has recently rejected. In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, _____U.S. _____, 51 U.S.L.W. 4953 (1983), ("*MVMA*"), this Court overruled a similar attempt of the court below to require an agency to provide more clear and convincing

reasons for rescinding a rule than those upon which it relied when it originally promulgated the rule.

Recognizing that "an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances'," 51 U.S.L.W. at 4956, *MVMA* holds that an agency rescinding a rule must supply the same reasoned analysis applicable to the issuance of the rule. *See* 51 U.S.L.W. at 4956-57. In this case, however, by deeming only a "study, survey, or support" to be an adequate justification for EPA's rescission, that was not required for the original rule, the court below imposed on EPA a heavier burden than that required for the original rule. This result is inconsistent with one of the reasons for the development of the administrative process—to eliminate the "constant danger of harmful rigidity . . . ."[40]

In rescinding its "dual" definition EPA fully met the standard decision-making elements prescribed in *MVMA*. Its decision-making path was clear: on consideration of the totality of the record before it, EPA decided on balance that its 1980 "dual" definition of source had proved inappropriate. *See* 46 Fed. Reg. at 50766, 50767-68.

This Court has recognized in other cases that an agency may make and rely upon reasoned policy judgments and that any such judgment " 'necessarily involves deductions based on the expert knowledge of the Agency'." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595 (1981) (footnote omitted), (*quoting*, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), *quoting*, *FPC v. Transcontinental Gas Pipeline Corp.* 365 U.S. 1, 29 (1961)). In rescinding the "dual" definition of "source," EPA has, with a full explanation based on the administrative record, rationally changed its expert judgment as to the best policy to implement Part D.

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[40] "Administrative Procedure in Government Agencies": Report of the Attorney General's Committee on Administrative Procedure. S. Rep. No. 8, 77th Cong., 1st Sess. 14 (1941).

In vacating EPA's action, the court below exceeded the scope of judicial review articulated in *MVMA* and a host of earlier decisions, notably *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-549 (1978), and cases therein cited.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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A. STATUTORY PROVISIONS: PERTINENT SECTIONS OF THE CLEAN AIR ACT

Title I—Air Pollution Prevention and Control

Part A—Air Quality and Emission Limitations

Section 101 (42 U.S.C. § 7401). Findings and Purposes

(a) The Congress finds—

* * *

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments;

* * *

Section 107 (42 U.S.C. § 7407). Air Quality Control Regions

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * *

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—
(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;
(B) do not meet, or in the judgment of the State may not in

the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;
(C) do not meet a national secondary ambient air quality standard;
(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or
(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.
(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary.

* * *

(4) [1]Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after August 7, 1977, shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.

* * *

Section 110 (42 U.S.C. § 7410). Implementation Plans

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. . . .
(2) The Administrator shall, within four months after the

[1] Subsection 107(d) was enacted without a paragraph (3).

date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I), (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

* * *

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 171(2)) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas);

* * *

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph

(2) and has been adopted by the State after reasonable notice and public hearings.

* * *

Section 111 (42 U.S.C. § 7411). Standards of Performance for New Stationary Sources

(a) For purposes of this section:
(1) The term "standard of performance" means—
(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) of this section applies, a standard—
(i) establishing allowable emission limitations for such category of sources, and
(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion,
(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) applies, a standard such as that referred to in subparagraph (A)(i);

* * *

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.
(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.
(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * *

(6) The term "existing source" means any stationary source other than a new source.

* * *

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

* * *

Part D—Plan Requirements for Nonattainment Areas

Section 171 (42 U.S.C. § 7501). Definitions

For the purpose of this part and section 110(a)(2)(I)—

(1) The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a).

(2) The term "nonattainment area" means, for any air pollutant an area which is shown by monitored date or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 107(d)(1).

(3) The term "lowest achievable emission rate" means for any source that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms "modification" and "modified" mean the same as the term "modification" as used in section 111(a)(4) of this Act.

Section 172 (42 U.S.C. § 7502). Nonattainment Plan Provisions

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 110(a)(2)(I) as a precondition for the construction or modification of any major stationary source in any such area after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) shall—

(1) be adopted by the State (or promulgated by the Administrator under section 110(c)) after reasonable notice and

public hearing;
(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;
(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;
(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under subsection (a);
(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;
(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements);
(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;
(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

* * * *

Section 173 (42 U.S.C. § 7503). Permit Requirements

The permit program required by section 172(b)(6) shall provide that permits to construct and operate may be issued if—
(1) the permitting agency determines that—
(A) by the time the source is to commence operation, total

allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress (as defined in section 171); or

(B) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 172(b);

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by an entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this Act; and

(4) the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirementsof this part.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1)(A) shall be legally binding before such permit may be issued.

* * *

Title III—General

* * *

Section 302 (42 U.S.C. § 7602). Definitions

When used in this Act—

* * *

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the protential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

B. GLOSSARY OF CERTAIN ABBREVIATIONS AND TECHNICAL TERMS

(Section references are to the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, as amended)

Attainment or PSD areas—(for purposes of Part C of the Act) Areas identified by the states as having ambient air quality levels better than any NAAQS or which cannot be classified on the basis of available information. Sections 107(d), 161.

Bubble—Netting within a plant of emission increases against decreases of such emissions.

Construction moratorium—Prohibition of construction or modification of major stationary sources that would contribute to violation of NAAQS in nonattainment areas if a Part D SIP is not in effect. Section 110(a)(2)(I).

LAER (for purposes of Part D of the Act)—Lowest achievable emission rate. Sections 171(3), 173(2).

Major stationary source—Source emitting, or having potential to emit, one hundred tons per year or more of any air pollutant. Section 302(j).

Modification of a source (for purposes of Part D of the Act)—A physical change in or manner of operating a source resulting in a net pollutant emission increase. Sections 111(a)(4), 171(4).

NAAQS—National ambient air quality standards. Section 109.

New source (for purposes of section 111)—Any stationary source constructed or modified after publication of regulations or proposed regulations prescribing an applicable standard of performance. Section 111(a)(2).

Nonattainment areas (for purposes of Part D of the Act)—Areas identified by the states as not meeting one or more NAAQS. Sections 107(d), 171(2).

Offset ruling—EPA's Emission Offset Interpretative Ruling, 41 Fed. Reg. 55524 (December 21, 1976).

Part C—Sections 160–169A dealing with prevention of significant deterioration.

Part D—Sections 170–178 dealing with plan requirements for nonattainment areas.

PSD—Prevention of "significant deterioration." Part C of Title I of the Act (Sections 160–169A).

Reasonable further progress (for purposes of Part D of the Act)—Annual incremental reductions in emissions of applicable air pollutants sufficient to provide for timely attainment of NAAQS. Section 171(1).

Reconstruction—when more than 50% of the capital cost of the components of a source is replaced, regardless of whether this causes a net increase in emissions. EPA's nonattainment area regulations; *see, e.g.*, former 40 C.F.R. § 51.18(j)(1)(ix) (1981).

SIPs—State Implementation Plans for the attainment, maintenance and enforcement of NAAQS. Section 110.

New source standards of performance (for purposes of Section 111)—Air pollutant emission standards reflecting the degree of emission reduction achievable through application of the best system of continuous emission reduction that has been adequately demonstrated. Section 111(a)(1).

C. REVISIONS TO THE LIST OF CORPORATE PETITIONERS' PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES SET FORTH, PURSUANT TO SUPREME COURT RULE 28.1, IN APPENDIX C TO THE PETITION FOR A WRIT OF CERTIORARI IN NO. 82-1247

The following corrections, additions and deletions are to be made to the list of corporate petitioners which were intervenor-respondents together with the American Petroleum Institute in the proceedings below. The original list of subsidiaries and affiliates for Gulf Oil Corporation is set forth in Appendix C to the Petition for a Writ of Certiorari in No. 82-1247 at 38a - 41a, for Mobil Oil Corporation at 43a - 52a, and for Phillips Petroleum Company at 53a - 54a.

Gulf Oil Corporation

1. "Chinhac Chemical Company, Ltd." should be "Chinhae Chemical Company, Ltd."
2. "G.S. Equipment and General Supply," "Gulf Canada Petroleum Inc.," "Gulf Canada Resources Inc./Resources Gulf Canada Inc.," "Gulf Canada Resources Leasing Inc." and "Gulf Oil Canada-Greenland A/S," should be *deleted* in favor of "Gulf Oil Canada Limited Associated Companies."
3. "China Gulf Plastics Corporation" should be *deleted.*
4. "Taiwan VCM Industries Corporation" should be *deleted.*
5. "Bio Research Center Company, Ltd." should be *deleted.*
6. "Agricultural Anhydrous Ammonia Co. Ltd." should be *deleted.*
7. "Alberta Products Pipe Line Ltd." should be *deleted.*
8. "Alberta Underground Storage Limited." should be *deleted.*
9. "Burgan Pension Fund Trustees Limited" should be *deleted.*
10. "Canada Systems Group (EST) Limited" should be *deleted.*
11. "Cansulex Limited" should be *deleted.*

12. "Carnduff Gas Limited" should be *deleted.*
13. "Central Pipeline Company Limited, The" should be *deleted.*
14. "Commercial Alcohols Limited" should be *deleted.*
15. "Compagnie D'Investissement Combustibles De Reacteurs A Haute Tp" should be *deleted.*
16. "Components Industriales Mexicanos, S.A." should be *deleted.*
17. " 'Condor' Industria Quimica, S.A." should be *deleted.*
18. "Crediton Enterprises, Inc." should be *deleted.*
19. "Econ Oil (1977) Inc." should be *deleted.*
20. "G&C Realty Limited" should be *deleted.*
21. "GAE Propane Blanchard Ltee." should be *deleted.*
22. "GEA/Power Cooling Systems, Inc." should be *deleted.*
23. "Glen Park Gas Pipe Line Company Limited" should be *deleted.*
24. "Gobles Oil and Gas Limited" should be *deleted.*
25. "Kaisha" should be *deleted.*
26. "Ice Pinturas, S.A." should be *deleted.*
27. "Ico Pinturas, S.A." should be *deleted.*
28. "Industrias Veneedor, S.A." should be *deleted.*
29. "Interprovincial Pipe Line Limited" should be *deleted.*
30. "Interquimica S.A." should be *deleted.*
31. "Iranian Oil Participants Limited" should be *deleted.*
32. "Iranian Oil Services (Holdings) Limited" should be *deleted.*
33. "Kuwait Oil Company Trustees Limited" should be *deleted.*
34. "Maple Insurance Limited" should be *deleted.*
35. "Mid-Atlantic Chemical Corporation S.A." should be *deleted.*
36. "Montreal Pipe Line Limited" should be *deleted.*
37. "Morrow Fuel Oil Sales Ltd." should be *deleted.*
38. "Mozambique Gulf Oil" should be *deleted.*
39. "Newfoundland Propane Limited" should be *deleted.*
40. "Northward Development Ltd." should be *deleted.*
41. "Northwest Propane Ltd." should be *deleted.*

42. "Northwest Terminals Ltd." should be *deleted.*
43. "Nova, An Alberta Corporation" should be *deleted.*
44. "Panindustrial, S.A." should be *deleted.*
45. "Peace Pipe Line, Ltd." should be *deleted.*
46. "Penrith Enterprises, Inc." should be *deleted.*
47. "Permapint, S.A." should be *deleted.*
48. "Petromont, Inc." should be *deleted.*
49. "Polyquimicos, S.A." should be *deleted.*
50. "Produtos Quimicos Somox, Ltda." should be *deleted.*
51. "Redwater Water Disposal Company Limited" should be *deleted.*
52. "Resinas Andinas S.A." should be *deleted.*
53. "Rimbey Pipe Line Co., Limited" should be *deleted.*
54. "Ripon Enterprises, Inc." should be *deleted.*
55. "Servico Limited" should be *deleted.*
56. "Sorrenio Electronics, Inc." should be *deleted.*
57. "Superior Propane Limited" should be *deleted.*
58. "Syncrude Canada, Ltd." should be *deleted.*
59. "Taiwan Plasticizer Corporation" should be *deleted.*
60. "Trans Mountain Pipe Line Company, The" should be *deleted.*
61. "Trans-Northern Pipe Line Company" should be *deleted.*
62. "Western G.M.C. Pontiac Buick Ltd." should be *deleted.*
63. "Forenade Svenska Oljeimportorers AB" should be *added.*
64. "Gulf Oil Corporation ERISA" should be *added.*
65. "Gulf Oil Terminals (Ireland) Limited" should be *added.*
66. "Harshaw - Bryce & Co. Pty. Ltd." should be *added.*
67. "Insco Holding & Finance Company N.V." should be *added.*
68. "Plastijal Sociedad Anonima" should be *added.*
69. "Solvo Finanzierungs-Und Beteiligungs AG" should be *added.*
70. "Valley Pines Associates" should be *added.*

Mobil Oil Corporation

1. "AIMCO (Blasbjerg) Limited" should be *added.*

2. "Arabian International Maritime Company" should be *added.*
3. "Compania Colombiana De Forestacion S.A." should be *added.*
4. "Constructura Calle 67, Limitada" should be added.
5. "East Texas Sal Water Disposal Company" should be added.
6. "Handelmaatschappij Jugenholtz & Co. B.V." should be *spelled* "Handelmaatschappij Hugenholtz & Co. B.V."
7. "Inmunizadoras Unidas, S.A." should be *added.*
8. "Mobil Oil de Mexico, Sociedad Anonima" should be *added.*
9. "New Zealand Synthetic Fuels (Housing) Corporation Limited" should be *added.*
10. "S.A. Ets. George DUBOIS" should be *added.*
11. "Societe Africaine de Rarrinage" should be *spelled* "Societe Africaine de Raffinage."
12. "Societe Jean Roussel S.A." should be *added.*
13. "Societe Tehadienne D'Entreposage de Produits Petroliers" should be *spelled* "Tchadienne D'Entreposage de Produits Petroliers."
14. "Wadohjushi Kabushiki Kaisha" should be *spelled* "Wakohjushi Kabushiki Kaisha."
15. "City Point Oil Terminal, Inc." should be *deleted.*
16. "Australasian Petroleum Company Proprietary Limited" should be *deleted.*
17. "Croager Bros. Limited" should be *deleted.*
18. "Fountain Garage (Alfreton Road)" should be *deleted.*
19. "Fountain Garage (Leyton)" should be *deleted.*
20. "H.E. Oils Limited" should be *deleted.*
21. "Highgate Associates, Ltd." should be *deleted.*
22. "Industria de Carbon del Valle Cauca, S.A." should be *deleted.*
23. "Island Exploration Company Proprietary Limited" should be *deleted.*
24. "Michael Beecham Limited" should be deleted.
25. "Mobil Oil Angola, SARL" should be deleted.

26. "Mobil Tyco Solar Energy Corporation" should be *deleted.*
27. "Modern Buildings Membranes, Ltd." should be *deleted.*
28. "Motrate Products Limited" should be *deleted.*
29. "Ragosine Oil Company Limited" should be *deleted.*
30. "Roe Lubricants Limited" should be *deleted.*
31. "Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)" should be *deleted.*

Phillips Petroleum Company

1. "Kanai LNG Corporation" should be *spelled* "Kenai LNG Corporation."
2. "Phillips Gas Supply Corporation" should be *deleted.*
3. "Phillips Pacific Checmical Corporation" should be *spelled* "Phillips Pacific Chemical Corporation."

Nos. 82-1005, 82-1247, and 82-1591

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In the Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A. INC., PETITIONER
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

AMERICAN IRON AND STEEL INSTITUTE, ET AL., PETITIONERS
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

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QUESTION PRESENTED

Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its State Implementation Plan contains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.

PARTIES TO THE PROCEEDING

In addition to the American Iron and Steel Institute, petitioners in No. 82-1247 include the American Petroleum Institute, the Chemical Manufacturers Association, General Motors Corporation, and the Rubber Manufacturers Association. Nominal parties under Rule 19.6 include various member companies of two of the organizations that are petitioners in No. 82-1247, and a group of 81 electric power generating companies and two electric utility trade associations, all of which were intervenor-respondents in the court of appeals. Those additional parties are listed at 82-1247 Pet. iii-iv nn. 1, 2, & 3.

Respondents in these cases, in addition to the Natural Resources Defense Council, Inc., include Citizens for a Better Environment, Inc., and the Northwestern Ohio Lung Association, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1005

CHEVRON U.S.A. INC., PETITIONER

v.

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No. 82-1247

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

OPINIONS BELOW

The opinion of the court of appeals (82-1005 Pet. App. A1-A20) is reported at 685 F.2d 718.[1]

[1] "82-1005 Pet. App." refers to the appendix to the petition in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.*

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1982. Timely petitions for rehearing were denied on October 27, 1982 (82-1005 Pet. App. B22-B25). The petitions for a writ of certiorari were timely filed on the following dates: No. 82-1005, December 15, 1982; No. 82-1247, January 25, 1983; No. 82-1591, March 25, 1983 The petitions were granted, and the cases consolidated, on May 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.*, are reproduced in Appendix A to the brief of the American Iron and Steel Institute. Pertinent portions of implementing regulations, 40 C.F.R. 51.18(j), are reproduced in the Addendum to this brief and at 82-1247 Pet. App. 32a-33a.[2]

STATEMENT

The 1977 Amendments to the Clean Air Act required "nonattainment" states—states that had not yet met prescribed national air quality standards—to establish a permit program (commonly called a "new source review" or "NSR" program) regulating the construction of "new or modified major stationary sources" of air pollution. The Act does not define the term "stationary sources" for purposes of this NSR program; so the Environmental Protection Agency undertook to develop one. Its regulations permit a state under certain circumstances to adopt a "plantwide" definition of "stationary source." The court of appeals held that this definition is unlawful, concluding that the EPA is bereft of any discretion to leave the states such flexibility. The question in this case is whether that court's conclusion is correct.

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[2] "82-1247 Pet. App." refers to the appendix to the petition in *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, Inc., et al.*

The EPA regulations, first proposed in 1979 and adopted in 1981, permit (but do not require) those states that have an approved "State Implementation Plan" ("SIP") providing for timely attainment of national air quality standards to treat an entire industrial plant as a single "source." This means that the addition of equipment (and modifications to existing equipment) *within* a plant do not trigger formal new source review *if increased emissions from the new or modified unit are offset by corresponding decreases from other units at the plant*, so that aggregate plant emissions do not increase by more than de minimis amounts. The regulations also permit the states to treat each component or process unit at a plant as a separate source. Thirty-one states (or jurisdictions within states)[3] have to date availed themselves of the option to adopt the plant definition of "source."

Under either definition, new plants located in nonattainment areas are subject to new source review. Additions or alterations at existing sites, however, require review under the plantwide definition only if total emissions from the plant as a whole increase. In contrast, a definition that focuses on each process unit within the plant requires new source review whenever there is a significant increase in emissions from an individual unit, regardless of *net* impact on air quality.

In this case, the United States Court of Appeals for the District of Columbia Circuit held that the 1977 Amendments, as construed by it in prior cases, leave the Agency with no discretion to permit states to adopt a plantwide definition. The decision requires review of numerous equipment modifications that have no effect on air quality (because of intra-plant offsets), and notwithstanding that a State Implementation Plan approved by EPA provides for timely attainment of national air

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[3] Most State Implementation Plans cover an entire state. In approximately eight states, however, there is a separate plan for designated areas within the state.

quality standards. Further, while the 1981 regulations allow each state to select the appropriate definition in light of its particular pollution problems, the court of appeals imposed a uniform standard on every state.

1. In the Clean Air Act, Congress established a federal-state partnership that recognizes that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. 1857(a)(3) and 42 U.S.C. (Supp. V) 7401(a)(3).[4] See also Section 107(a), 42 U.S.C. 1857c-2(a) and 7407(a). EPA was required to establish primary and secondary National Ambient Air Quality Standards ("NAAQS"). Section 109, 42 U.S.C. 1857c-4 and 7409.[5] Primary NAAQS are designed to protect the public health; secondary NAAQS are to protect the public welfare.

Following EPA promulgation of the NAAQS, each state was required to adopt a plan, known as a "State Implementation Plan" or "SIP," to attain and maintain these NAAQS by the deadlines established in the Act. Sections 107(a) and 110(a)(2), 42 U.S.C. 1857c-2(a) and 7407(a), 42 U.S.C. 1857c-5(a)(2) and 7410(a)(2). If a SIP provided for timely attainment and maintenance of the NAAQS and otherwise complied with the requirements of the Act, the Administrator was required to approve it. Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2) and 7410(a)(2). Primary standards were generally to be attained by 1975.

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[4] At the time of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, the Act was codified at 42 U.S.C. 1857 *et seq.* In 1977 the Act was further amended. As amended, the Act was reclassified to 42 U.S.C. (Supp. V) 7401 *et seq.* Where reference is made to pre-1977 provisions that were not materially changed by the 1977 Amendments, citations to both the former and present codifications are provided. We will hereinafter omit "Supp. V" in references to the current version of the Act.

[5] Pursuant to this authority, the Administrator has promulgated primary and secondary NAAQS for sulfur dioxide (SO_2), particulate matter, carbon monoxide (CO), nitrogen dioxide (NO_2), photochemical oxidants, and lead. 40 C.F.R. Pt. 50.

2. By 1975 it became clear that many areas had failed to attain primary air quality standards and thus continued to have excessive levels of pollution. Concern was also expressed that existing law might prohibit construction or modification of any industrial facility in a nonattainment area.

Congress not having acted, EPA implemented an administrative solution. In December 1976, it published an interpretive rule commonly known as the "Emissions Offset Ruling." See 41 Fed Reg. 55524-55530. The Offset Ruling imposed three conditions on the construction or modification of any major source in nonattainment areas.[6] First, emissions from existing sources in the area were to be reduced by an amount greater than the projected emissions from the proposed new or modified source. Second, state-of-the-art emissions control technology was to be installed to meet the "lowest achievable emission rate" for the particular source. Third, the owner or operator of the proposed source had to certify that all existing sources in the area under his control were in compliance with the applicable SIP, or were on an approved compliance schedule. EPA also requested that the states develop and submit revised SIPs for all areas in which the national standards had not been attained. See 41 Fed. Reg. 28600 (1976).

In 1977 Congress passed the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.* Part D of Title I of the amended act[7] dealt with nonattainment areas. Part D had

> two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States

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[6] The Offset Ruling referred to a "major source" as "any structure, building, facility, installation or operation (or combination thereof) for which the allowable emission rate is equal to or greater than [prescribed levels]" (41 Fed. Reg. 55528 (1976)).

[7] 42 U.S.C. 7501-7508.

> greater flexibility for the former purposes than EPA's present interpretive regulations afford.

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 211 (1977), *reprinted in* 4 Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 2678 (Comm. Print 1978) [hereinafter *Leg. Hist.*].

Steps prescribed for nonattainment areas included submission of substantially revised SIPs for the Administrator's approval by July 1, 1979.[8] In order to be approved, a revised SIP was required to provide for attainment of the primary NAAQS by December 31, 1982.[9] Revised SIPs also had to comply with requirements set out in new Section 172(b) of the Act, 42 U.S.C. 7502(b). These included: implementation of all reasonably available control measures as expeditiously as practicable; adoption, at a minimum, of reasonably available control technology for existing sources; annual incremental reductions in emissions leading to "reasonable further progress" toward attainment; emissions limitations, schedules of compliance, and other measures necessary to meet the requirements of Section 172; and—most important for this case—a permit program governing construction of "new or modified major stationary sources" of air pollution.[10]

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[8] Prior to July 1, 1979, a state without an approved revised SIP continued to be generally subject to EPA's Offset Ruling.

[9] 42 U.S.C. 7502(a)(1). If a state demonstrated that it could not meet the 1982 deadline for attainment of the primary NAAQS for carbon monoxide or ozone, the Administrator was authorized to grant extensions to December 31, 1987. 42 U.S.C. 7502(a)(2).

[10] Section 172(b)(2), (3), (6), and (8), 42 U.S.C. 7502(b)(2), (3), (6), and (8). A stationary source is defined as "major" if it "directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * *." Section 302(j), 42 U.S.C. 7602(j). An existing major source is "modified" whenever its emissions increase by more than a de minimis amount, as determined by EPA. Sections 111(a)(4) and 171(4), 42 U.S.C. 7411(a)(4) and 7501(4); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). These significance thresholds for "modifications" apply under both the plantwide and dual definitions.

The permit program for new or modified sources—usually called the new source review ("NSR") program—was designed to correct a "major weakness in implementation of the 1970 Act": "the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines." S. Rep. No. 95-127, 95th Cong., 1st Sess. 55 (1977), 3 *Leg. Hist.* 1429. Section 173, 42 U.S.C. 7503, establishes the four mandatory elements for a new source review program. First, a permit may be issued only if the owner or operator of the new source obtains sufficient emission reductions in the region to offset the increased emissions from that source and allow for reasonable further progress toward attainment—or, alternatively, if the increased emissions will not exceed an allowance for growth budgeted by the state pursuant to Section 172(b)(5), 42 U.S.C. 7502(b)(5). Second, the source must be equipped with state-of-the-art emission controls meeting a standard described as the "lowest achievable emission rate" ("LAER"). Third, the permit applicant must certify compliance with the applicable State Implementation Plan for his other sources in the state. Finally, no permit may be issued unless the state is carrying out the applicable implementation plan for the relevant nonattainment area. See Section 173(1)-(4), 42 U.S.C. 7503(1)-(4).

In addition, Congress required each state to impose a limited conditional moratorium on the construction or modification of major stationary sources in nonattainment areas if the state did not have a revised Part D SIP approved by EPA on July 1, 1979. Upon approval of a revised SIP, the moratorium would be inapplicable and the construction or modification of major stationary sources would be governed by the SIP. Section 110(a)(2)(I), 42 U.S.C. 7410(a)(2)(I).[11]

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[11] An issue concerning the construction moratorium is currently under consideration by the agency. The 1977 Amendments set an attainment deadline for most primary air quality standards of De-

3a. The NSR (and moratorium) programs apply to "major stationary sources." But the term "sources" is not defined in the Act for purposes of these nonattainment programs. Since enactment of the 1977 Amendments, two competing definitions have been suggested. Under a plantwide definition, a so-called "bubble" concept is employed to treat the entire plant as a source; that is, the plant is viewed as if it were encased in a bubble that has a single emission point for the plant as a whole.[12] Under this definition, when emissions from one unit within a plant are increased or a new unit is added, the change need not undergo formal new source review if the operator can reduce emissions of the same pollutant elsewhere within the plant so that total emissions do not increase by more than a de minimis amount.[13] In contrast, under a dual definition, each process unit within a plant, as well as the plant as a whole, is viewed as a "source." Thus, any major new unit or any significant increase in emissions from an existing unit triggers

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cember 31, 1982. Some areas have, however, failed to attain that goal. Initially, as we explained in our reply brief at the petition stage (at 9 n.13), EPA concluded that the Act required the moratorium to be imposed in these regions. See 48 Fed. Reg. 4972 (1983). Subsequently, the new Administrator reexamined the issue and concluded that the moratorium was not mandatory if the state had an approved implementation plan and had made reasonable efforts to achieve attainment. See Remarks of William D. Ruckelshaus to the Annual Convention of the Air Pollution Control Association (June 23, 1983); N.Y. Times, June 24, 1983, at A10, col. 1. EPA is now in the process of formulating this policy and preparing implementing regulations.

[12] As applied in the NSR program, the bubble concept is sometimes referred to in the literature as "netting" because operations within a plant are offset or netted against each other. See, *e.g.*, Council on Environmental Quality, *Thirteenth Annual Report* 185 (1982).

[13] If total emissions do not increase by more than a de minimis amount, the change is not deemed a "modification" of the plantwide source for purposes of new source review. See page 6 note 10, *supra*.

formal new source review, even if aggregate emissions from the plant decrease or remain the same.[14]

b. In January 1979, EPA first addressed the requirements for new source review programs under Part D of the amended Clean Air Act. See 44 Fed. Reg. 3274, 3276-3277.[15] EPA indicated that it would permit states with approved revised SIPs to adopt a plantwide definition of "source";[16] states without approved revised SIPs, however, would be required to treat each individual unit as a "source" subject to new source review. In proposing this approach, EPA explained (*id.* at 3276, 3277):

> Where a state implementation plan is revised and implemented to satisfy the requirements of Part D including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intra-source offsets so that there is no net increase in emissions. The Agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost.
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[14] Under both definitions the plant as a whole would be subject to new source review whenever its aggregate emissions increase by more than a de minimis amount even if no individual process unit would be subject to review. This can occur when several new pieces of equipment that are "minor" emitters of pollution (see page 6 note 10, *supra*) result in a cumulative increase in emissions sufficient to constitute a "modification" of the plant as a whole. It can also occur when existing equipment is altered in a way that emissions from any individual unit do not increase by more than a de minimis amount but total emissions from the plant in the aggregate do significantly rise.

[15] This occurred in the context of a revision to the Offset Ruling and a discussion of the new requirements for SIPs.

[16] This plantwide approach was limited to modifications of existing facilities and did not apply to the addition of a major new facility (44 Fed. Reg. 3277 (1979)).

> The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions * * * must contain adopted measures assuring that reasonable further progress will be made. Furthermore, * * * the measures adopted * * * must be sufficient to actually provide for attainment of the standards by the dates required under the Act * * *. Also, Congress intended under Section 173 of the Act that States would have some latitude * * * when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to * * * stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions.

In April 1979 EPA reiterated these considerations and adhered to its January 1979 approach. See 44 Fed. Reg. 20372, 20379.[17] In discussing the requirements for revised SIPs, the agency noted its "policy to encourage and assist states in adopting economically efficient pollution control methods" (*id.* at 20373). In particular, citing to the January 1979 discussion, EPA repeated that it "encourages states to consider allowing plants to place less control on processes where the marginal cost of control is high, in return for placing greater control where cost is low, so that the total control satisfies SIP requirements" (*id.* at 20373 n.9).

Thereafter, in September 1979, EPA formally proposed to allow states with approved SIPs to use a plantwide definition. See 44 Fed. Reg. 51924, 51958.[18] EPA explained (*id.* at 51933 (citation omitted)):

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[17] This discussion was contained in a general preamble for proposed rulemaking with respect to revised State Implementation Plans.

[18] This plantwide definition did not distinguish between modified equipment and new (or reconstructed) equipment; rather, it allowed intra-plant offsets to be applied to all changes at a plant. See 44 Fed. Reg. 51933 (1979).

> [C]omplete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach * * * [of] plant-wide review but no review of individual pieces of equipment. * * * [T]his is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment.

In addition, EPA noted that it proposed a consistent plantwide definition of "source" both for the new source review program in nonattainment areas and for the program for the prevention of significant deterioration—the "PSD" program—in areas that had attained national air quality standards (*id.* at 51925, 51926).[19]

In August 1980, EPA abruptly reversed its position. Instead of allowing states with approved SIPs to use a plantwide definition, it imposed an across-the-board dual definition that treats as "sources" both an entire plant and the discrete pieces of pollution-emitting equipment within the plant.[20] The states were therefore required—irrespec-

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[19] The PSD program was originally enacted as Part C of the 1977 Amendments, Sections 160-169, 42 U.S.C. 7470-7479. Designed to prevent the deterioration of air quality in areas in which ambient air is cleaner than required by national standards, it contains a preconstruction review program requiring compliance with stringent emission and technology standards. Section 165(a), 42 U.S.C. 7475(a). See *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979). Because an area can attain federal standards for one pollutant but not for another, a project in a given area can be subject to both PSD and NSR reviews.

[20] See 40 C.F.R. 51.18(j)(1)(i)-(iii) and 52.24(f)(1)-(3) (1981). The 1980 regulations defined "stationary source" to mean "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act"; the terms "building, structure, or facility" were defined to denote a plant, while "installation" was defined as "an identifiable piece of process equipment."

tive of any actual effect upon aggregate plant emissions or air quality—to subject new and modified units to new source review under all circumstances where emissions from the unit increased by more than de minimis amounts. See 45 Fed. Reg. 52676, 52696-52698 (1980). EPA believed that the dual definition was supported by the purpose of the nonattainment program to improve existing air quality (*id.* at 52693, 52697) and was consistent with the legislative history of the 1977 Amendments (*id.* at 52697). The agency recognized that applying a different definition of "source" to the NSR and PSD programs would "add[] to the complexity of the permitting process" (*ibid.*),[21] and it acknowledged the claim "that some sources may not be willing to modernize their facilities" under the dual definition (*id.* at 52698). EPA concluded, however, that such considerations were outweighed by the need to "bring in more sources and modifications for review and * * * require better pollution control technology in nonattainment areas" (*ibid.*).[22] These regulations were promptly challenged by numerous industries. See *Chemical Manufacturers Association* v. *EPA*, No. 79-1112 (D.C. Cir.).[23]

Seven months later EPA announced its intention to return to its original proposal to allow states to use a plantwide definition of "source" under the new source review program. 46 Fed. Reg. 16280 (1981); J.A. 89-96. Having reviewed the dual definition as part of "a Government-wide reexamination of regulatory burdens and complexities," and having "reevaluated all of the arguments on all sides of these definitional issues" (46 Fed.

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[21] The 1980 regulations adopted a plantwide definition of "stationary source" for PSD purposes (45 Fed. Reg. 52731 (1980)).

[22] In addition, the 1980 regulations treated substantially reconstructed process units as new sources. 40 C.F.R. 51.18(j)(1)(ix) and 52.24(f)(9) (1981). The effect of this approach was to require formal new source review of such reconstructed facilities even when emissions were not greater than those of the equipment superseded.

[23] This litigation was settled in response to the ensuing administrative developments outlined below.

Reg. 16281 (1981)), EPA concluded that neither the statute nor its legislative history provides a definition and therefore that the "question * * * involves a judgment as to how best [to] carry out the Act" (*ibid.*). The agency found that the plantwide definition was preferable because (a) the dual definition was a disincentive to modernization of facilities, resulted in a ban on modifications in areas subject to the construction moratorium notwithstanding that the project would not increase and could even reduce emission levels, and served to retard progress in air pollution control by discouraging the replacement of older, dirtier processes and equipment; (b) consistency in the definition of "source" under the NSR and PSD programs would simplify the regulations and reduce confusion and regulatory burden; and (c) the approved SIP providing for reasonable further progress and timely attainment gave adequate assurances that the purpose of the Part D program would not be impeded (*ibid.*). In addition, EPA pointed out that, even under a plantwide definition, new equipment is in any event subject to still another program—the New Source Performance Standards ("NSPS") program under Section 111 of the Act, which requires that prescribed standards of pollution control technology be applied to new equipment.[24]

EPA solicited public comments on its proposal. There was strong support for the plantwide approach.[25] Accordingly, in October 1981, EPA exercised its discretion to promulgate the plantwide definition, 40 C.F.R. 51.18(j)

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[24] The NSPS program was enacted in 1970. Section 111, 42 U.S.C. 1857c-6 and 7411. It imposes a single technology-forcing requirement and is applicable uniformly throughout the country without regard to the attainment or nonattainment of air quality standards. See *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981); *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978). Unlike the NSR and PSD programs, NSPS contains an explicit definition of "source" to be used in that program. Section 111(a)(3), 42 U.S.C. 1857c-6(a)(3) and 7411(a)(3).

[25] The rulemaking record is discussed at pages 32-33 and 38-40, *infra*.

(1)(i)-(ii) and 52.24(f)(1)-(2) (see 46 Fed. Reg. 50766 (1981); J.A. 97), characterizing it as the one "best suited to the nonattainment program" (46 Fed. Reg. 50769 (1981)).[26] EPA noted that its definition conforms to the PSD definition of source, and eliminates the need to determine what particular pieces of equipment constitute a "source" under the dual definition (*id.* at 50767, 50768) —thus reducing regulatory complexity. In addition, EPA determined that the plantwide definition was in accord with Congress's intent that states play an important role in pollution control and have flexibility under the Act to balance environmental and economic goals (*id.* at 50767, 50768).

EPA emphasized that states choosing to adopt the plantwide definition "must demonstrate that their plans, as revised, continue to demonstrate [reasonable further progress] and attainment" (46 Fed. Reg. 50767 (1981)). Because "demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D" (*ibid.*). EPA also reiterated that the dual definition would impede modernization of existing plants and, especially in areas subject to the construction moratorium, could actually hinder the reduction of emissions (*id.* at 50768).[27]

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[26] In the 1981 regulations, a "stationary source" is defined to mean "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." In turn, the constituent elements "building, structure, facility, or installation" are defined in terms of the entire plant and do not refer to individual pieces of equipment. 40 C.F.R. 51.18(j)(1)(i)-(ii); 40 C.F.R. 52.24(f)(1)-(2). States retain the option to define an individual unit as a "source." 40 C.F.R. 51.18(j)(1).

[27] In the October 1981 regulations EPA also eliminated the special reconstructed source rule that had been adopted in 1980 (see note 22, *supra*), explaining that, in light of the plantwide definition of "source," a reconstruction requirement no longer was necessary because an entire plant is rarely reconstructed (46 Fed. Reg. 50767 (1981); J.A. 103).

4. On November 18, 1981, the Natural Resources Defense Council, Inc. ("NRDC"), Citizens for a Better Environment, Inc., and the Northwestern Ohio Lung Association, Inc., filed a petition for review of the EPA's October 1981 regulations in the United States Court of Appeals for the District of Columbia Circuit.[28] That court granted the petition for review and vacated EPA's regulations (82-1005 Pet. App. A20). The court acknowledged that "Part D, dense as it is, does not explicitly define what Congress envisioned as a 'stationary source' to which the permit process and construction moratorium should apply" (*id.* at A8). The court also found that the issue was not "squarely addressed in the legislative history" (*ibid.*), and it "agree[d] with EPA that 'with regard to the actual content of the definition of "source," the legislative history is at best contradictory'" (*id.* at A17 n.39 (citation omitted)). Nevertheless, the court declined to defer to the agency's regulation. Instead, the court concluded that the case was "controlled" (*id.* at A13) by two of its prior decisions, *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), and that those cases "impelled" it to reject the plantwide definition as "impermissible" (82-1005 Pet. App. A3, A4). According to the court, those decisions, taken together, establish (*id.* at A16 (emphasis added; footnote omitted))

> a bright line test for determining the propriety of EPA's resort to a bubble concept. The bubble concept * * * is *mandatory* for Clean Air Act programs designed merely to maintain existing air quality; it is *inappropriate* * * * in programs enacted to improve the quality of ambient air.

The court "express[ed] no view on the decision we would reach if the line drawn in *Alabama Power* and *ASARCO* did not control our judgment" (*id.* at A4 n.7); instead, it summarily concluded that, because the objective of the entire nonattainment program was to improve (rather

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[28] See Section 307(b)(1), 42 U.S.C. 7607(b)(1).

than maintain) air quality, a plantwide definition of the term "source" was absolutely prohibited for purposes of the new source review program (*id.* at A17-A18).

The court deemed it irrelevant that new source review is but one element of the intricate regulatory complex constituting the nonattainment program. In addition, notwithstanding the House Report that explained that "allow[ing] States greater flexibility" is one of the "two main purposes" of Part D of the statute (H.R. Rep. No. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678), the court concluded that such flexibility is only "a method of attaining" the goal of improved air quality, but "is not an independent goal of the nonattainment scheme" (82-1005 Pet. App. A19). In the court's view, the only pertinent consideration under its "bright line" test was that the purpose of the nonattainment program falls "on the 'improving' side of the line" as between air quality maintenance and air quality improvement (*id.* at A17).[29]

SUMMARY OF ARGUMENT

The question presented in this case is whether the Administrator of EPA has discretion under Part D of the Clean Air Act Amendments to allow nonattainment states the option of using a plantwide approach to new source review in cases where the State Implementation Plan has been approved as consistent with the Act and contains adequate assurance of further progress toward and timely attainment of national air quality standards.

1. The court of appeals, although acknowledging that neither the text nor the legislative history of the Act furnishes a definition of "stationary source," invented a so-called "bright line" test of its own—a test creating a set of rigid statutory pigeon-holes whose function is to strip the Administrator of any discretion whatever in working out the details of the nonattainment program.

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[29] The court also invalidated EPA's deletion of the reconstructed facilities rule, see notes 22 and 27, *supra*, reasoning that the agency's action depended upon its adoption of the plantwide source definition (82-1005 Pet. App. A19-A20).

In so doing, the court of appeals violated fundamental principles of administrative law. Instead of deferring to the Administrator's wholly reasonable definition, the court substituted its own version of good policy and imposed on the agency—and the states—a mechanical and artificial formula not rooted in the language or history of the Act. But under the Clean Air Act, as under other statutes, this Court has made it clear that the task of formulating policy by filling in gaps implicitly or explicitly left by Congress belongs to the administrative agency authorized to administer the congressional program, and not to the courts; the Administrator's construction is to be given deference and upheld if it is reasonable. *Train* v. *NRDC*, 421 U.S. 60 (1975).

2. Measured against these standards of judicial review, the court of appeals erred in casting aside the agency's interpretation of "source"—an interpretation that is a reasonable exercise of administrative discretion fully consistent with the purposes of the Clean Air Act. Giving the states the option to use a plantwide approach to new source review represents a balanced accommodation of the multifarious purposes of the Act. In passing the nonattainment provisions of the 1977 Amendments, Congress made it clear that it wanted to achieve a reasonable balance between the policies of improving air quality and encouraging industrial growth. The plantwide definition encourages modernization and expansion by eliminating the expense and delay of new source review for equipment changes that do not materially affect *net* air quality, which is held harmless by the requirement of intra-plant offsets. It thus allows pollution to be reduced in the cheapest and most efficient way, provided that the state has an approved SIP that is consistent with the Act and provides for reasonable further progress toward and timely attainment of national air quality standards. In the meantime, new equipment is in any event subject to technology forcing regulation under the independent New Source Performance Standards program. Accordingly, the plantwide definition is sensibly

designed to effectuate the congressional purpose to encourage industrial renewal consistent with timely achievement of the goal of attainment.

3. The Administrator's decision allowing states with approved SIPs to use a plantwide definition fulfills Congress's express purpose to provide increased flexibility to the states in accommodating the policies of environmental protection and industrial growth in light of local conditions. Congress understood that in a geographically and industrially diverse nation problems of air pollution and their solutions are not uniform. The plantwide definition allows a state to adapt its attainment strategy to local conditions by dispensing with costly new source review in cases in which there is no significant increase in a plant's emissions; it allows the state to concentrate its scarce enforcement resources on those measures (*e.g.*, mobile sources or fugitive emissions) that are truly important to that state's attainment of national air quality standards.

4. The court of appeals was correct in finding that the meaning of "source" for purposes of the New Source Review program is neither explicitly defined by statute nor specifically addressed by legislative history. Contrary to respondents' assertion, the specific definition of "sources" in Section 111 of the Clean Air Act—itself ambiguous—is expressly limited to the discrete program created by that provision and does not apply to Part D. Respondents' contention that the history of the 1977 Amendments points to a congressional decision to deny the Administrator any discretion to adopt a plantwide approach is belied by the convoluted and lengthy legislative history. That history shows that Congress eliminated from the nonattainment provisions all language pointing toward a legislatively mandated definition precluding administrative discretion in defining the term "source." Insofar, then, as Congress addressed the question of how "source" should be defined in this context, its only decision was *not* to decide that question for itself. Accordingly, the normal rule—that the Administrator is to have

authority to implement the statute with respect to matters not legislatively determined—should operate. And since the Administrator exercised this discretion by adopting a regulation that effectuates the various policies of the Act, that leaves the states a sensible flexibility to adapt their attainment strategies to local circumstances, and that prevents new or modified sources from prejudicing attainment, that regulation should be sustained.

ARGUMENT

THE ADMINISTRATOR'S DECISION TO ALLOW STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" IN NONATTAINMENT AREAS IS VALID

I. THE COURT OF APPEALS' DECISION DEPRIVING THE ADMINISTRATOR OF ANY DISCRETION TO ALLOW STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" AND IMPOSING A TEST OF ITS OWN INVENTION WAS ERRONEOUS

The question presented in this case is whether it is permissible for the Administrator of EPA to allow states the option to use a plantwide definition of the term "source" under the NSR provisions of Part D of the Clean Air Act Amendments. The court of appeals correctly found that Part D of the Act, "dense as it is, does not explicitly define what Congress envisioned as a 'stationary source' * * *" (82-1005 Pet. App. A8); that this issue is not "squarely addressed in the legislative history" (*ibid.*); and that " 'the legislative history is at best contradictory' " (*id.* at 17 n.39 (citation omitted)). The court nevertheless invalidated the Administrator's determination that a state may use the plantwide definition if its SIP contains all of the elements required by the Act and provides for reasonable further progress toward and timely attainment of national air quality standards.

The decision of the court of appeals is fundamentally at odds with the most basic principles of administrative law, and constitutes an unwarranted usurpation of the authority reserved to the administrative agency. Congress having left the matter open, it was not for the court to invent a standard of its own. The decision

whether to leave the states with reasonable flexibility rather than mandating a single rigid bright line test was to be an administrative, not a judicial, decision. Thus, once again, the United States Court of Appeals for the District of Columbia Circuit has ignored this Court's admonition that "[a]dministrative decisions should be set aside * * * only for substantial * * * substantive reasons as mandated by statute [and] not simply because the court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978) (citation omitted).

The court of appeals purported to derive its "bright line" test (82-1005 Pet. App. A16) from its earlier decisions in *ASARCO, Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1978).[30] Under that test, the bubble concept is mandatory and must be applied in Clean Air Act programs that are designed to *maintain* existing air quality; conversely, it may not be applied where the purpose of the program is to *improve* air quality. Finding that the purpose of Part D of the 1977 Amendments is to improve air quality, the court concluded that the plantwide definition is prohibited under the new source review program.

This "bright line" test is wholly unjustified. The court of appeals has judicially defined the term "source" for all purposes under the Clean Air Act and has left the Administrator with no discretion whatever—a remarkable result given the court's conclusion that the text and legislative history of the Act do not provide a definition. In fact the court's test is an artificial construct, an invention extrapolated from two previous decisions involving not the NSR program but two distinct Clean Air Act programs. From these decisions the panel in this case derived a rigid and simplistic formula: the lawfulness of regulations defining the meaning of "source" for purposes of a particular Clean Air Act program turns on

[30] In fact, a reading of those cases will show that they do not support the simplistic and rigid dichotomy created by the "bright line" test formulated by the court in this case.

whether "the" purpose of "that program" is air quality maintenance or air quality improvement. This mechanical approach creates a dangerously distorting perspective. It assumes that all parts and all subparts of a complex and variegated program can be pigeonholed into one simply-stated overriding purpose. It assumes that every subsection of a complex statute works in an undifferentiated manner toward one simple end. But the various provisions of the various nonattainment and air quality maintenance programs cannot be fitted into such a mold. Of course the ultimate purpose of attainment *is* attainment—that is, eventual compliance with a fixed set of air quality standards. But Congress made clear that it wanted "reasonable economic growth" and "greater flexibility" for the states as well as "reasonable further progress * * * [toward] attainment." See H.R. Rep. No. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678 (pages 5-6, *supra*). And the various complex regulatory substructures operate in different ways with respect to these multifarious purposes. As we shall show, the plantwide approach that the Administrator made permissible is fully consistent with the statutory requirement of "reasonable further progress" toward timely attainment; it simply eliminates formal new source review where growth and efficiency can be accommodated to attainment without such review. Since the definition in this way reasonably meets the *various* purposes Congress directed the Administrator to keep in mind, it was not for the court to shunt it aside and substitute its own judgment as to what the solution to the definitional problem should be.

The Clean Air Act gives broad power to the Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter" (42 U.S.C. 7601(a)(1)). Accordingly, the court of appeals was not at liberty to intrude upon the Administrator's authority. "The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

Morton v. *Ruiz*, 145 U.S. 199, 231 (1974). A reviewing court is not free to overturn the Administrator "simply because it may prefer another interpretation of the statute" or because "reasonable men could easily differ as to their construction" (*INS* v. *Wang*, 450 U.S. 139, 144 (1981)). Rather, "[i]t is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute" (*Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971)), and the agency's construction of the statute "'should be followed unless there are compelling indications that it is wrong.'" *Beal* v. *Doe*, 432 U.S. 438, 447 (1977) (citations omitted).

Under the Clean Air Act itself this Court has "accorded great deference to the Administrator's construction of the * * * Act." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976). To sustain the agency's position, the Court need not "go[] so far as to hold that * * * [its] construction of the Act was the only one it permissibly could have adopted." *Train* v. *NRDC*, 421 U.S. 60, 75 (1975). It must find only that the agency's construction of this "complex statute" is "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency" (*id.* at 87).

Measured against these standards of judicial review, the court of appeals erred in casting aside the agency's definition of "source." Since 1979, when EPA first considered the issue after enactment of the 1977 Amendments—and with one brief deviation—EPA has interpreted its statute as authorizing it to give states with an approved SIP the flexibility to use a plantwide definition of "source." As we now show, this administrative interpretation constitutes a reasonable exercise of the Administrator's authority, one that is fully consistent with the purposes of the Clean Air Act. Because the court of appeals has substituted judicial rulemaking for this reasonable exercise of discretion, its "bright line" test must be rejected.

II. THE ADMINISTRATOR'S DECISION TO ALLOW STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" COMPORTS WITH THE POLICIES OF THE STATUTE AND IS A REASONABLE EXERCISE OF ADMINISTRATIVE DISCRETION

The regulation at issue in this case, allowing the states to adopt the "bubble" concept by using a plantwide definition of "source" for purposes of the nonattainment program, helps effectuate both of the statute's

> two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretive regulations afford.

H.R. Rep. No. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678. The Administrator's decision to promulgate this regulation was, accordingly, a reasonable—and eminently sensible—exercise of administrative discretion, one that should not have been set aside.

A. The Plantwide Definition Of "Source" Represents A Balanced Accommodation Of The Statutory Policies Of Environmental Protection And "Reasonable Economic Growth"

1. *Congress's Purpose Was To Achieve A Reasonable Balance Between The Policies Of Environmental Protection And Industrial Growth*

The legislative history of the 1977 Amendments makes clear that the nonattainment program was designed "as a means of assuring realization of the dual goals of attaining air quality standards and providing for new economic growth [in nonattainment areas]" (H.R. Rep. No. 95-294, *supra*, at 13, 4 *Leg. Hist.* 2480). The House Report further explained (H.R. Rep. No. 95-294, *supra*, at 210, 4 *Leg. Hist.* 2677 (citation omitted)):

> [A] complete prohibition on new growth or expansion in nonattainment regions would pose very serious problems. The economic impact on certain

> urban areas of such a growth ban could be quite harmful. Similarly, certain industries pointed out in testimony the large cost increases that might be necessary if new plants had to be located in completely new areas rather than expanding existing facilities or locating new plants near existing ones.
>
> Similarly, in areas of particularly high unemployment complete restriction of growth or expansion possibilities might exaggerate unemployment or at least hinder reemployment efforts. Concern was also expressed about the aggregate impact of such growth restrictions on the general economy's recovery from the recent recession.
>
> In order to reconcile these conflicting concerns, the committee adopted [the nonattainment program]. The purpose of the provision is to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act.

Reconciling the attainment of national air quality standards with "new industrial growth" was "[o]ne of the most difficult clean air issues" that confronted the Congress. 123 Cong. Rec. 16204 (1977) (remarks of Rep. Waxman), 4 *Leg. Hist.* 3055. Congressman Rogers stated (123 Cong. Rec. 16196 (1977), 4 *Leg. Hist.* 3036-3037):

> [O]ver the past years our Nation has been beset by serious economic and energy problems. These factors have presented a new challenge requiring a midcourse correction in the 1970 Clear Air Act; corrections which will help assure our Nation's continued economic growth and vitality.

Accordingly, Part D of the 1977 Amendments "provides a new, more flexible means of assuring continued economic growth in areas now exceeding primary air quality standards while continuing toward attainment of these standards which protect public health." 123 Cong. Rec. 16196 (1977) (remarks of Rep. Rogers), 4 *Leg. Hist.* 3037. See also 123 Cong. Rec. 16197-16198 (1977) (remarks of Rep. Rogers), 4 *Leg. Hist.* 3040-3041.

The same principle was expressed during debate over the Conference Report on the 1977 Amendments. Senator Stevens observed (123 Cong. Rec. 26852 (1977), 3 *Leg. Hist.* 369):

> The measure before the Senate * * * recognizes that the goal of enhanced environmental quality must be sought in the context of other national objectives. Some of the most extensively discussed portions of this measure, in fact, are those providing a mechanism to continue economic growth at the same time we reduce pollution levels. I believe we have succeeded in providing this balance so that pollution can be abated while orderly economic growth is sustained.[31]

Likewise, the House debate on the Conference Report noted the "balance [in the bill] which can assure us of a cleaner environment and a growing economy at the same time" (123 Cong. Rec. 27069 (1977) (remarks of Rep. Carter), 3 *Leg. Hist.* 317), and it emphasized

> a proper balance between environmental controls and economic growth in the dirty air areas of America. * * * There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised. * * *
>
> This is a fair and balanced approach, which will not undermine our economic vitality, or environmental objectives.

123 Cong. Rec. 27076 (1977) (remarks of Rep. Waxman), 3 *Leg. Hist.* 336.[32]

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[31] Senator Muskie pointed out, with respect to state authority to sanction future growth, that "a community which is anxious to attract new capital and relies on heavy economic activity will have to show that it has a plan to achieve health standards by specific dates and at each point that major new economic activity becomes attractive, that plan will have to be checked and the time schedule reviewed to assure that a community is fulfilling its commitment." 123 Cong. Rec. 26842 (1977), 3 *Leg. Hist.* 342-343.

[32] See also National Commission on Air Quality, *To Breathe Clean Air* 1, 2-3 (1981). We note that in 1980 total expenditures for air

It was in the context of this "more flexible" and "balanced" approach that the new source review program was created to ensure that industrial growth did not worsen air quality. As the Senate Report explained, a "major weakness in implementation of the 1970 Act has been the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines." S. Rep. No. 95-127, *supra*, at 55, 3 *Leg. Hist.* 1429. See also *Hancock* v. *Train*, 426 U.S. 167, 194 (1976). Based on this experience, it was concluded that "[s]ome mechanism is needed to assure that before new or expanded facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards. * * * [This will] assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline" (S. Rep. No. 95-127, *supra*, at 55, 3 *Leg. Hist.* 1429). See also 123 Cong. Rec. 18018 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 716; 123 Cong. Rec. 18038 (1977) (remarks of Sen. Stafford), 3 *Leg. Hist.* 771.[33]

In sum, the overarching purpose of the new source review program was to assure that new plants and equipment would not prejudice the transition from nonattainment to attainment. To be sure, as the court of appeals correctly stated, the overall objective of the nonattainment provisions of Part D in their entirety is "to ameliorate the air's quality in nonattainment areas" (82-1005 Pet. App. A17) and "improve the quality of ambient air" (*id.* at A16 (footnote omitted)). But the bubble concept —permissible only in states with approved attainment plans—is in no way inconsistent with that overall objective. It assures that the quality of air will be "held

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pollution abatement and control represented $25.4 billion. Council on Environmental Quality, *supra*, at 307 (Table A-80).

[33] See also *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 346, 401 (D.C. Cir. 1979).

harmless" from new plant and equipment; at the same time it allows the other elements of the regulatory scheme to operate to assure that states will attain the required air quality. For it is important to remember that new source review is only one of an integrated complex of regulatory measures mandated by Part D. These include the requirement of reasonable further progress toward timely attainment (Section 7502(b)(3)); the implementation of all reasonably available control measures as expeditiously as practicable (Section 7502(b)(2)); the adoption, at a minimum, of reasonably available control technology for existing sources (Section 7502(b)(3)); and the development of emissions limitations, schedules of compliance, and other measures that may be necessary to achieve compliance (Section 7502(b)(8)). In addition, under the Section 111 NSPS program new equipment is independently subject to technological "quality control." See page 13 & note 24, *supra*. Given this integrated statutory scheme, it is misleading to isolate the new source review program and to assume that it was designed *all by itself* to *improve* national air quality.[34] New source review was designed to ensure that reasonable economic growth could continue without *prejudicing*—as it had under the 1970 Act—progress toward the enhancement of air quality in nonattainment areas.[35]

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[34] As the court stated in *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 346, "[t]he provisions for the attainment and maintenance of [national ambient air quality standards] were to operate primarily through controls on existing sources of pollution." See also L. Lave & G. Omenn, *Clearing the Air: Reforming the Clean Air Act* 46 (1981). For example, in Houston, Texas—an area that has experienced substantial growth in recent years—emissions from new sources account for less than 1% of the total emissions inventory for ozone. See *Clean Air Act Oversight: Hearings Before the Senate Comm. on Environment and Public Works*, 97th Cong., 1st Sess., Pt. 2, at 169 (1981).

[35] A similar purpose animates the construction moratorium: to prevent a worsening of pollution while the state prepares a revised SIP in conformity with the 1977 Amendments (44 Fed. Reg. 38471, 38472 (1979); *id.* at 51936). In addition, the moratorium serves to

2. *The Plantwide Definition Of "Source" Serves To Ensure That "Reasonable Economic Growth" Does Not Prevent Attainment Of Air Quality Standards*

A plantwide definition of "source" is well suited to promoting the objectives of the new source review program: allowing growth without threatening the attainment of national air quality standards. Under this definition, the expansion or alteration of a plant is not subject to new source review if emissions elsewhere in the plant are correspondingly reduced, so that there is no significant impact on air quality.[36] In addition, the State Implementation Plan must contain all of the elements required by the Clean Air Act and provide for reasonable further progress toward and timely attainment of air standards. In this way, economic expansion and industrial modernization are facilitated without impeding the goal of achieving improved air quality.

The economic issues at stake in achieving a "balanced approach" (see 123 Cong. Rec. 27076 (1977), 3 *Leg. Hist.* 336) were accurately set forth by the court of appeals in its prior decision in *Alabama Power Co.* v. *Costle*, *supra*, holding that a plantwide definition of "source" is applicable to the preconstruction review program for the prevention of significant deterioration ("PSD") in attainment areas (636 F.2d at 401):

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provide an incentive for states promptly to develop and submit revised SIPs (*ibid.*). Like the NSR program, the construction moratorium is designed to ensure that new "sources" do not exacerbate the levels of pollution and thereby prevent reasonable further progress and timely attainment.

[36] As explained above (see page 6 note 10, *supra*), a source is "modified" whenever its emissions increase by more than the de minimis levels. These significance levels—which, we note, apply under both the plantwide and dual definitions—are extremely modest. For instance, the de minimis level for sulfur dioxide is 40 tons per year. 40 C.F R. 51.18(j)(1)(xiii); 40 C.F.R. 52.24(f)(13). By contrast, in 1978 total sulfur dioxide emissions in the United States were 29.7 million tons. National Commission on Air Quality, *supra*, at 288 (Table 47).

> It is important first to recognize that alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands. * * * To apply * * * [a process-unit] construction of "increase," however, would require PSD review for many such routine alterations of a plant; a new unit would contribute additional pollutants, these increases could not be set off against the decrease resulting from abandonment of the old unit, and thus the change would become a "modification" subject to PSD review. Not only would this result be extremely burdensome, it was never intended by Congress in enacting the Clean Air Act Amendments.

Here, too, a plantwide definition "will allow for improvement of plants, technological changes, and replacement of depreciated capital stock, without imposing a completely disabling administrative and regulatory burden" (636 F.2d at 400).[37] On the other hand, the dual definition can impose new source review on even routine changes in a single piece of equipment. The resulting expense and delay create a substantial disincentive to expand capacity or replace outmoded and inefficient equipment, hampering growth and retarding modernization. See 46 Fed. Reg. 16281 (1981); *id.* at 50766, 50767-50768.[38]

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[37] Similarly, the plantwide definition is consistent with the purposes of the construction moratorium (see pages 27-28 note 35, *supra*). Because of offsetting reductions within the plant, the plantwide definition ensures that an expansion or modernization project will not produce significant net increases in emissions and thus worsen air quality while the state is preparing its SIP. And, since the moratorium prohibits both the construction of all new plants and the renovation of existing plants for which there is an emissions increase, the state has a strong incentive promptly to develop and submit a SIP in compliance with federal requirements. See 46 Fed. Reg. 50769 (1981).

[38] "No aspect of the Clean Air Act is more frustrating to industry than the expensive analyses, multiple delays, and uncertainties in

A simple example will illustrate the point. Consider a plant with two pieces of equipment, each emitting 500 units of pollution. Suppose that it is economically desirable to modernize and expand the capacity of machine *A*, leading to an increase in its emissions to 700 units, and that at the same time emissions from machine *B* would be correspondingly reduced from 500 to 300 units. It would surely be review for review's sake here to require the project to undergo the expense and delay of new source review, since the project would have no adverse impact on air quality. Now assume that machine *A*, if subject to new source review (including its requirement that LAER technology be installed) under the dual definition, would emit 600 units of pollution after expansion. Assume that the LAER technology would cost $2 million [39] and that the company would have to spend an additional $.5 million to reduce the emissions from machine *B* by 101 units in order to offset the 100-unit increase at machine *A*, as required by Section 173(1)(A). Assume also that the company could reduce emissions from machine *B* by 200 units at a cost of $1 million. In these circumstances, the dual definition would entail an expenditure for pollution control of $2.5 million (plus the additional costs of new source review). On the other hand, under the plantwide definition, the project would not be subject to new source review and would involve a cost of only $1 million. The dual definition might completely deter the proposed expansion and modernization

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the permit process for construction or modification of plants." L. Lave & G. Omenn, *supra*, at 38-39. See also *id.* at 46. It has been found that the median time for new source review permits to be processed and approved is three to five months, with more than 25% of the permits taking a longer time. National Commission on Air Quality, *supra*, at 139-140.

[39] The alternative of reducing pollution from expanded machine *A* by circa 200 units, so that the project would not be a "modification" subject to NSR, if feasible at all, would necessarily exceed the cost of installing LAER technology and hence make the project even more expensive.

even though the project would not adversely affect air quality. And even if the project goes forward, the dual definition has increased the cost of modernization by $1.5 million without benefiting air quality.

Our example illustrates that the plantwide definition is consistent with the objectives of the NSR program. It ensures that emissions from new or modified sources do not prejudice attainment; it requires review of those projects that could interfere with achievement of national air quality standards. It also facilitates the statutory policies of industrial growth and modernization by eliminating the costs necessary to comply with new source review for projects that do not adversely affect air quality. And it gives a plant owner the flexibility to control emissions in the most efficient manner.

The economic benefits of this flexible approach were explained in a recent study by the Brookings Institution:

> Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control. * * * [The "bubble" or "netting" concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply.

L. Lave & G. Omenn, *Cleaning the Air: Reforming the Clean Air Act* 28 (1981) (footnote omitted); see also *id.* at vii, 18-19, 46, 48. Likewise, the Council on Environmental Quality has noted that "[i]n the case of air quality management, several studies indicate that there are many market-based opportunities for cleaning the air and reducing air pollution costs at the same time." Council on Environmental Quality, *Thirteenth Annual Report* 181 (1982) (footnote omitted). In view of these advantages, the Council has recommended that

> greater attention be focused on the use of cost/benefit analysis and the use of market-based ap-

proaches to environmental management. These analytical and regulatory tools offer potential for continuing environmental improvement while reducing the incremental costs of such improvements. In times of general economic austerity and high unemployment, it is important to explore alternative, more economically efficient approaches to the "command and control" kinds of regulatory programs now in general use.

Id. at 176.[40]

Comments submitted to EPA in the rulemaking proceeding both by industry [41] and the states also support the

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[40] Although no specific study has yet been made of the economic impact of the plantwide definition in the NSR program, generic studies indicate that uniform "command and control" measures typically have costs two to 10 times greater than flexible methods. See A. Kneese, *Economics and the Environment* 163-164 (1977); Zerbe, *Optimal Environmental Jurisdictions*, 4 Ecology L.Q. 193, 215 (1974). The General Accounting Office has found that studies of economic incentive approaches "suggest that our environmental targets can be achieved at only a modest fraction of the costs under traditional command and control programs. Estimates of the static savings in abatement costs for particular pollutants range from about 40 percent to about 90 percent * * *." U.S. General Accounting Office, *PAD-82-15, A Market Approach to Air Pollution Control Could Reduce Compliance Costs Without Jeopardizing Clean Air Goals* 34 (Mar. 23, 1982). And studies of pollution reductions from existing emission points at a plant indicate that a flexible approach will have a cost that is between 25% and 63% lower than a point-performance standard to achieve the same air quality result. See Maloney & Yandle, *Cleaner Air at Lower Cost: Bubbles and Efficiency*, Regulation, May-June 1980, at 49, 51; *Air Pollution—Kahn Stresses Analyzing Marginal Costs of Standards*, [9 File Binder] Env't Rep. (BNA) 2131 (Mar. 23, 1979) (statement of Alfred Kahn, Chairman of the President's Council on Wage and Price Stability).

[41] For example, a utility company noted that the plantwide definition would "encourage industry to modernize existing facilities through retrofit or replacement of old equipment and should speed progress toward * * * more efficient emissions controls." C.A. App. 147 (Southern California Gas Company). A pharmaceutical company stated that the plantwide definition would "in-

conclusion that the plantwide definition would promote both the growth and modernization of industry and the economically efficient control of emissions. For example, the New York State Department of Environmental Conservation commented (J.A. 128-129):

> The main outcome of requiring individual review of each new piece of equipment at a plant in a non-attainment area was to preclude any modernization. No flexibility was permitted a source owner in selecting options. In many cases, it was simpler and cheaper to operate old, more polluting sources than to trade up. * * *
>
> The previous definition requiring individual review of any new unit would be fine if there were an infinite amount of investment capital available and an incentive for scrapping existing equipment.[42]

In fact, these comments show that the plantwide definition can lead to greater reduction in emissions than the dual definition, because it encourages the replacement of older, highly polluting machinery with newer, cleaner equipment. See 46 Fed. Reg. 16281 (1981); *id.* at 50766, 50767-50768. Once again consider a plant with two machines each discharging 500 units of pollution. Customer demand justifies expanding machine *A*, which would then emit 700 units of pollution. Assume that emis-

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crease[] flexibility and * * * enhance economic incentives" and would "encourage the * * * replace[ment of] older equipment." C.A. App. 156 (Upjohn Company). A paper manufacturer pointed out that it would be able to reduce plantwide emissions in order to utilize a new printing press that would not have been installed under the dual definition. J.A. 131 (Crown Zellerbach). And the comments of a major trade association offered an example of a modernization project that would be feasible under a plantwide definition but would be put off if the dual definition were applicable to require new source review. C.A. App. 198-199 (Chemical Manufacturers Association). See also C.A. App. 234 (American Iron and Steel Institute); C.A. App. 136 (National Steel Corporation); C.A. App. 67 (Union Oil Company).

[42] See also J.A. 136-137 (Arizona Department of Health Services).

sions from machine *B* could be reduced to 250 units by modernization costing $1 million and that the cost of reducing the pollution from machine *A* to 500 units is $3 million. Under the plantwide definition, the project—which would result in a net emissions *reduction* of 50 units—would not be subject to new source review, and would cost $1 million for pollution control.[43] Under the dual definition, new source review would be required—notwithstanding the overall decrease in pollution levels—unless emissions from the expanded machine were reduced at a cost of $3 million, which could render the project uneconomical. The alternative of complying with the new source review requirements might be no better, for the expense and delay could make it impractical to expand. The consequence of applying the dual definition might thus be that the equipment would not be expanded or modernized and the emissions from the plant would not be reduced.[44]

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[43] In addition, as some commentators have noted, the "bubble" or "netting" concept may serve as an incentive for developing cost-effective pollution control technology. See Note, *An Overview of the Bubble Concept*, 8 Colum. J. Envtl. L. 137, 155 (1982), citing Landau, *Economic Dream or Environmental Nightmare? The Legality of the "Bubble Concept" in Air and Water Pollution Control*, 8 B.C. Envtl. Aff. L. Rev. 741, 742-743 n.6 (1980).

[44] This consideration is especially significant in areas in which the construction moratorium is in effect. The moratorium prohibits the modification of a "source" even though the proposed project, by installing newer equipment or utilizing cleaner operations, would effect a net reduction in total emissions from the plant. In this situation, the dual definition bars modernization projects that would be of environmental (as well as economic and commercial) advantage. See 46 Fed. Reg. 16281 (1981); *id.* at 50768. Several comments in the administrative record emphasized this concern and presented examples of environmentally desirable modernizations that could not go forward under the dual definition because of the moratorium. See the comments of: American Iron and Steel Institute (C.A. App. 234); American Textile Manufacturers Institute (J.A. 133-134); Chemical Manufacturers Association (C.A. App. 198-199); Chevron (C.A. App. 163); Congressman George Miller of California (J.A. 135); Louisiana-Pacific Corporation (J.A.

In sum, the "bubble" concept not only makes eminent economic sense, but carries out with precision Congress's expressly stated purpose of encouraging economic growth and industrial renewal without prejudicing the timely attainment of national air quality standards.[45]

B. The Administrator's Decision To Allow States To Use A Plantwide Definition Of "Source" Effectuates Congress's Purpose To Increase State Flexibility In Selecting The Detailed Methods Deemed Necessary To Attain National Air Quality Standards

The regulations in issue in this case, giving states with an approved SIP the choice of using the plantwide definition of "source" for purposes of the new source review program, properly allow the states discretion in the selection of the particular means of implementation and enforcement necessary to attain required air quality.

1. From the first congressional efforts in 1955 to improve the quality of our Nation's air (Act of July 14, 1955, ch. 360, 69 Stat. 322 *et seq.*) to the present, the

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118-119); National Steel Corporation (C.A. App. 135); New York State Department of Environmental Conservation (J.A. 128-129); Standard Oil Company (SOHIO) (C.A. App. 140); United States Department of Energy (C.A. App. 117); Upjohn Company (C.A. App. 156).

[45] The Administrator also found that the use of the same definition of "source" in the NSR and PSD programs would "reduce regulatory complexity" (46 Fed. Reg. 50767 (1981)). First, because a given project can be subject to both NSR and PSD review (since an area can be in nonattainment status for one pollutant and attainment status for another pollutant), such consistency of definition "simplifies the permit process" by determining for both reviews whether the project is or is not a "source" (*id.* at 50768). Second, the plantwide definition eliminates the difficulty of determining exactly what individual process units within a complex and integrated industrial operation would qualify as "sources" under the dual definition (*id.* at 50767, 50768). In fact, there is some indication in the legislative history of the 1977 Amendments that Congress contemplated that the meaning of the term "source" would be the same for the NSR and PSD programs. See H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 127, 128 (1977), 3 *Leg. Hist.* 507, 508.

states have been vested with primary responsibility for the control and prevention of air pollution at its source. The Court's cases prior to the 1977 Amendments have reviewed this development. See *Train* v. *NRDC*, 421 U.S. 60, 63-65, 86-87 (1975); *Hancock* v. *Train*, 426 U.S. 167, 169 (1976); *Union Electric Co.* v. *EPA*, 427 U.S. 246, 250, 256-257 (1976).[46] The keynote, as the Court observed in *Train* v. *NRDC*, *supra*, 421 U.S. at 79 (footnote omitted), is that EPA, as the federal agency,

> is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.

"Each State is given wide discretion in formulating its [State Implementation Plan]. * * * So long as the national standards are met, the State may select whatever mix of control devices it desires." *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 250, 266.

These principles were not changed by the 1977 Amendments. On the contrary, the House Report on the 1977 Amendments stated that one of the principal purposes of Part D was "to give the States *more* flexibility in determining how to protect public health while still permitting reasonable new growth" (H.R. Rep. No. 95-294, *supra*, at 213, 4 *Leg. Hist.* 2680 (emphasis added)). Once the requirements of federal law are met, "the State may choose whatever mix of continuous emission reduction measures and strategies it wants to meet the requirements of [Part D]" (*ibid.*).[47] The Senate likewise emphasized the need for state authority and flexibility:

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[46] See also Sections 101(a)(3) and 107(a), 42 U.S.C. 1857(a)(3), 7401(a)(3) and 1857c-2(a), 7407(a).

[47] See also 123 Cong. Rec. 15928 (1977) (remarks of Rep. Preyer), 4 *Leg. Hist.* 3022; 123 Cong. Rec. 16194-16195 (1977) (remarks of Rep. Meeds), 4 *Leg. Hist.* 3031-3032; 123 Cong. Rec. 16197 (1977) (remarks of Rep. Rogers), 4 *Leg. Hist.* 3038.

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. *The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals.*

S. Rep. No. 95-127, *supra*, at 10, 3 *Leg. Hist.* 1384 (emphasis added); see also S. Rep. No. 95-127, *supra*, at 3, 3 *Leg. Hist.* 1377.[48]

State discretion was thought to be necessary because both the problems of air pollution and their solutions are diverse and vary from area to area:

> Obviously, air pollution is a national problem requiring a national approach, but neither the problem nor the solutions are the same in various parts of the country. Geography, population density, degree of industrial concentration, land characteristics, and many other factors contribute to the variation that causes or mitigates pollution. For those reasons, [the bill] gives States primary responsibility for air pollution control on the theory that they are best suited to assess local conditions and needs and to most effectively enforce the controls necessary to achieve acceptable emission levels.
>
> In carrying out that responsibility, States and local governments are assigned *increased authority to develop and carry out implementation plans and flexibility in choosing the best approach within the broad framework of the national plan.*

123 Cong. Rec. 18042 (1977) (remarks of Sen. Randolph; emphasis added), 3 *Leg. Hist.* 778. Congress also believed that this approach represents a proper division of political responsibility between the national government and the states:

> These Amendments tell the American people that * * * the National Government realizes that change without an adequate underpinning cannot be forced;

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[48] See also *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 364.

> that local decisions locally arrived at with proper incentives, can achieve the goals we share.

123 Cong. Rec. 26841, 26842 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 341, 343.

Congress's concern with flexibility and sensitivity to local concerns was, in this context, based on more than abstract considerations of federalism. This Court has pointed out that the preparation of a State Implementation Plan is "a comprehensive planning task of the first magnitude" (*Train* v. *NRDC*, *supra*, 421 U.S. at 68). In striving to attain federal air quality levels, a state must inventory and control emissions that arise in a wide variety of ways within its borders. In any given nonattainment area, pollution can be caused by "minor" sources as well as major ones,[49] by mobile sources such as automobiles and trucks as well as by stationary sources, and by fugitive emissions such as windblown dust, unpaved roads, agricultural activities, and construction projects. The relative importance of each of these varies from area to area. And each of these causes of pollution poses a distinct control problem and requires different abatement efforts.

2. The regulations at issue here were expressly characterized by the Administrator as

> consistent[] with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution control * * * [and] intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area [new source review] programs and attainment demonstrations.

46 Fed. Reg. 50767 (1981) (citations omitted).

The administrative record in this case fully supports the Administrator's determination. Of the nine state,

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[49] A minor source is one that omits less than 100 tons per year of pollution. See page 6 note 10, *supra*.

regional, or local governmental agencies that participated in the 1981 rulemaking proceeding, seven favored the elimination of the mandatory dual definition and the optional use by the state of a plantwide definition consistent with that in the PSD program.[50] In fact, 31 states (or jurisdictions within states) have sought to modify their State Implementation Plans to adopt the plantwide definition (see page 3 & note 3, *supra*).

More particular examples of the significance of regional variations in the causes and control of pollution also dot the record. In its comments in the rulemaking proceeding, Arizona pointed out (J.A. 136) that application of the dual definition "would have had no substantial effect upon attainment status" in that state and would serve only "to deprive the State of its latitude in choosing [an] implementation strategy for Section 173 of the Act that would best fit local conditions * * *"[51]

[50] See comments of: the Arizona Department of Health Services (J.A. 136-137); California Air Resources Board (J.A. 154-155); Erie County, New York, Department of Environment and Planning (J.A. 153); Missouri Department of Natural Resources (J.A. 130); New York State Department of Environmental Conservation (J.A. 128-129); Ohio Environmental Protection Agency (J.A. 138); Ohio Regional Air Pollution Control Agency (J.A. 120-121). The only state comments in opposition to the plantwide definition were submitted by the Maryland Department of Health and Mental Hygiene, Office of Environmental Programs (J.A. 139-140) and the Pennsylvania Department of Environmental Resources (J.A. 122-127). In addition, in the 1979 rulemaking, the Alabama Air Pollution Control Commission (C.A. App. 75) and the New Hampshire Air Resources Commission (C.A. App. 110) submitted comments supporting the plantwide definition.

[51] In Arizona there were "only two urban nonattainment areas and the primary cause of both is the automobile * * *" (J.A. 136). In these circumstances, "no strategy applied to any stationary source would make any significant difference" (*ibid.*). The plantwide definition allows the state the flexibility to design an attainment strategy—such as one focusing on automobile emissions—that would be most effective in light of the state's specific situation. See also J.A. 162-166 (affidavit of Milton Feldstein) (automobile sources are of far greater importance to air quality in the San Francisco area than new or modified stationary sources).

Comments from Ohio indicated that Ohio has devised an attainment strategy that is broader and more encompassing than federal requirements. (J.A. 120-121, 138).[52] In various counties in western states, nonattainment is primarily attributable to fugitive emissions such as windblown dust, and in 1980 this problem resulted in 23 counties in five states being out of compliance with the national standard for total suspended particulates. National Commission on Air Quality, *To Breathe Clean Air* 114 (1981). Since such fugitive emissions "are not susceptible to traditional control strategies" (*ibid.*), the pollution in these areas would not be affected by using the dual definition of "source." See also *id.* at 118-119.

In enacting the 1977 Amendments Congress was aware of this complexity and diversity in the causes of air pollution.[53] It recognized the importance of flexibility in the design of emission control strategies adapted to the specific pollution problems faced by particular states. Its intention was that states be able to focus their efforts in the way best suited to their local and regional problems. As EPA noted in a related context, state "reviewing authorities have limited resources * * *." 41 Fed. Reg. 55525 (1976). The plantwide definition enables each state to focus its scarce implementation and enforcement resources on problems that truly matter. In contrast, the dual definition requires states to undertake new source review of individual units without regard to regional circumstances.

It is common ground that the need for state flexibility cannot excuse noncompliance with the requirements of the Clean Air Act. States must have a new source review program that comports with federal law. Compare 82-

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[52] Ohio reviews minor as well as major new emissions and requires that all such "individual equipment installations" employ the "best available technology" to control pollution (J.A. 120). See also J.A. 154-155 (California Air Resources Board).

[53] See e.g. 123 Cong. Rec. 18018, 26842 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 715, 342; 123 Cong. Rec. 16679-16680 (1977) (remarks of Rep. Daniel), 4 *Leg. Hist.* 3214.

1005 Pet. App. A19. But the statute provides no legislative definition of the term "source" for purposes of such new source review. By permitting the use of a plantwide rather than a dual definition, the Administrator in effect allows each state to make an informed and sensitive judgment on whether equipment-oriented (rather than plant-oriented) new source review is best suited to its overall pollution control strategy—a strategy embodied in an EPA-approved State Implementation Plan that must conform to all federal requirements and provide for reasonable further progress toward and timely attainment of national air quality standards. The Administrator's decision to accord the states that flexibility should be sustained.[54]

III. THE TEXT AND LEGISLATIVE HISTORY OF THE CLEAN AIR ACT DO NOT PRECLUDE THE ADMINISTRATOR FROM ALLOWING STATES TO USE A PLANTWIDE DEFINITION OF "SOURCE" FOR PURPOSES OF THE NONATTAINMENT PROGRAM

The court of appeals found that Part D of the 1977 Amendments to the Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source' to which the permit process and construction moratorium should apply" (82-1005 Pet. App. A8). The court also found that the legislative history of the Amendments does not "squarely address[]" the question (*ibid.*), and it "agree[d] with EPA that '[w]ith regard to the actual

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[54] Of course, it is possible—as the Administrator has recognized (see 46 Fed. Reg. 50767 (1981))—that use of the dual definition might be necessary in order for a given state to be able to demonstrate reasonable further progress and ultimate attainment. In those cases the state would not be free to use the plantwide definition, and a SIP containing the plantwide definition would not be eligible for EPA approval. If in any instance respondents believe that a specific plantwide definition will prevent the required progress and attainment, they may seek to challenge EPA's approval of *that* SIP in the court of appeals under Section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1).

content of the definition of "source," the legislative history is at best contradictory'" (*id.* at A17 n.39 (citation omitted)).

In their brief in opposition, respondents took issue with these conclusions. Relying on both the language and history of the Act, respondents contended that "[t]he Act * * * *does* determine the meaning of the term 'source' and the scope of the permit provisions in the nonattainment areas" (Br. in Opp. 10). In their view, Congress fixed the meaning of the word "source" in accordance with the dual definition, and the Administrator has no more discretion in this respect than if that definition had been included in the statute and enacted into law in haec verba.

We assume that respondents will discuss these contentions further in their brief on the merits, and a complete response must necessarily await our reply brief. At this juncture, we simply outline the principal considerations that indicate that the court of appeals was correct in its conclusion that the statute and legislative history do not foreclose the Administrator's discretion to allow states to use a plantwide definition.

1. The nonattainment provisions of Part D of the 1977 Amendments do not themselves contain a definition of the term "source." Nor is that term defined in the general definitional section of the Clean Air Act. See 42 U.S.C. 7602. Respondents have not contended otherwise.

Respondents have contended (Br. in Opp. 14, 15) that the definition of "source" in the NSPS provisions of Part A of the Act (see page 13 note 24, *supra*) is applicable as well to the nonattainment program created by Part D. Respondents fail to mention, however, that the NSPS definition in Section 111(a)(3), 42 U.S.C. 7411(a)(3), states expressly that it is applicable only "[f]or purposes of *this section*" (emphasis added)—that is, for Section 111, which was enacted in 1970 and establishes the NSPS program. By its terms, therefore, the NSPS defi-

nition of "source" does not extend to the new source review program.[55]

In fact, the 1977 Senate bill to amend the Clean Air Act contained a provision adopting the NSPS definition for all purposes under the Act. See S. 252, 95th Cong., 1st Sess. § 39(a), at 112 (1977), adding Section 302(m) to the Act, 3 *Leg. Hist.* 686. The House bill contained no such section. The Senate provision was deleted in Conference, and the nonattainment program as passed directed that "[a]ll [state] implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill." H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 157 (1977), 3 *Leg. Hist.* 537. At the same time, in enacting Part D Congress did incorporate by reference the NSPS definition of the terms "modifications" and "modified" See 42 U.S.C. 7501(4), incorporating by reference 42 U.S.C. 7411(a)(4). These legislative actions—deleting the Senate provision that expressly adopted the NSPS definition of "source" and incorporating by

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[55] In fact, the nonattainment program and the NSPS program are fundamentally different, so that there is no a priori reason to apply the NSPS definition to new source review. The nonattainment program is confined to areas that do not meet national air quality standards, and it remains in operation only as long as this nonattainment condition continues; in seeking to promote the goal of attainment, the program involves a complex of pollution-control measures, of which new source review is only one (see pages 6-7 and 26-27, *supra*). The NSPS program, in contrast, is applicable to new sources nationwide without regard to the existing quality of air; unlike the nonattainment program, NSPS employs the single technology-forcing approach of uniform federal standards requiring the installation of stringent emission controls on new emitters of pollution. See *Hancock* v. *Train*, *supra*, 426 U.S. at 193. The NSPS definition, which is indifferent to the *net* effect of equipment changes on air quality, surely should not control in the context of new source review, which is inextricably tied to the attainment or nonattainment of ambient air quality standards. The plantwide definition is well suited to the NSR program because it requires new source review in those instances where the prospect of attainment might be threatened by a net increase in emissions.

reference other NSPS definitions—are compelling indications that the 1977 Amendments do not, by silent implication, incorporate the NSPS definition of "source" for purposes of the NSR program.[56]

2. Respondents also have argued (Br. in Opp. 16-21) that the history of the 1977 Amendments shows that Congress intended to deprive the Administrator of all discretion to allow states to use a plantwide approach to new source review. Again, we deal only summarily with this argument here, since we cannot be certain whether respondents will choose to revive it in their brief on the merits. The argument—which failed to convince the court of appeals—rests on an account of the provenance of the 1977 Amendments that is blithely straightforward and unproblematical. Respondents start with the 1976 Senate bill, which, they allege, clearly contemplated a permit program geared to individual pieces of equipment. It was this approach which, they assert, was adopted by the Administrator as the "Emissions Offset Ruling" of December 1976, when the Congress in 1976 failed to enact a statute. It was also adopted without relevant change as the Sen-

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[56] Even if Section 111(a)(3) applied in the new source review program—and we note that the NSR definition promulgated by EPA in fact conforms precisely to the language in Section 111(a)(3) (see 82-1005 Pet. App. A9 n.22)—the agency should have discretion in construing the constituent terms "building, structure, facility, or installation." See *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 396, 398, 410; *ASARCO, Inc.* v. *EPA*, *supra*, 578 F.2d at 324 n.17; see also 82-1005 Pet. App. A9 n.22. Given the differences among the NSR program, the PSD program, and the NSPS program, those constituent terms need not be given a uniform meaning. See *Alabama Power Co.* v. *Costle*, *supra*, 636 F.2d at 397-398. As a matter of linguistic analysis, the terms "facility" and "installation" (as well, of course, as the terms "building" and "structure") can "reasonabl[y] * * * [be] define[d] * * * broadly enough to encompass an entire plant" (*id.* at 396; see also *id.* at 397).

It should also be noted that the Section 111 definition—if it is to apply to the NSR program—is not easily read to authorize—much less require—a *dual* definition of source.

ate's 1977 bill; moved unscathed through Conference; and was passed by both Houses in August 1977.[57]

This account is misleading. The complex legislative history of the 1977 Amendments is in fact anything but straightforward and unproblematical. It casts relatively little light on the specific question before the Court. The 1976 Senate bill did use phrasing that inferentially seems to point to a permit program geared to industrial units short of the entire plant.[58] The 1976 Emissions Offset Ruling is itself not explicit.[59] The 1977 Senate bill looks in two different directions: (a) It abandoned the specific phrase used in the 1976 bill which most powerfully points to an intra-plant unit approach.[60] (b) On the other hand,

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[57] This account is topped off with the suggestion (see Br. in Opp. 3) that the Administrator interpreted the statute as requiring a dual definition until, in a dramatic shift, the present regulations were adopted in October 1981. As we have pointed out, pages 9-14, *supra*, in fact the Administrator interpreted the 1977 statute as permitting a plantwide definition until August 1980 and returned to that interpretation in March 1981.

[58] The 1976 Senate bill created a permit program in nonattainment areas for "a [major emitting] facility proposed for construction or modification at an existing site or plant." S. 3219, 94th Cong., 2d Sess. 43-44 (1976), 6 *Leg. Hist.* 4652-4653. It is the use of the word "facility" in contradistinction to the word "plant" that respondents single out as important. (The bill defined "major emitting facility" as "any stationary source" of a particular capacity, and in turn incorporated the Section 111 NSPS definition of the term "stationary source." S. 3219, *supra*, at 77, 79 (proposed subsections (k) and (m) of Section 302), 6 *Leg. Hist.* 4686, 4688.)

[59] To establish the proposition that the Offset Ruling was equipment (rather than plant) oriented, respondents rely on implications derived from its preamble and on the assertion that the regulation's passing use of the phrase "a source may replace an existing source" must contemplate intra-plant units because "whole plants are almost never replaced." Br. in Opp. 19 n.39.

[60] The 1977 Senate bill substituted the phrase "a [major emitting] facility proposed for construction or modification in such region" for the previous language (see note 58, *supra*), thus eliminating the words "at an existing site or plant." See S. 252, *supra*, at 59, 3 *Leg. Hist.* 633.

the 1977 bill, like the 1976 bill, did incorporate the Section 111 NSPS definition as the relevant definition of the term "stationary source." See S. 252, *supra*, at 110, 112, 3 *Leg. Hist.* 684, 686.

Far more important, however, is that respondents' account is *Hamlet* without the Prince of Denmark. For what emerged from the 1977 Conference was not the Senate version of the permit program, but a Conference bill based on the *House* version. As the Conference Report stated,

> All implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill.

H.R. Conf. Rep. No. 95-564, *supra*, at 157, 3 *Leg. Hist.* 537. The House bill did not incorporate the NSPS definition of "source"; nor did the Conference bill. The House bill did not use the term "facility * * * at an existing site or plant" to describe the unit subject to new source review; like the Conference bill, it required a permit program for the construction of any "new or modified major stationary source," leaving the word "source" undefined. See H.R. 6161, 95th Cong., 1st Sess. 350-351 (1977), 4 *Leg. Hist.* 2335-2336. Most significantly, it was the nonattainment provisions of the House bill that were authoritatively reported as having, as their two "main" purposes, (a) "allow[ing] reasonable economic growth" while the area makes "reasonable further progress" toward attainment, and (b) "allow[ing] States *greater flexibility* for the former purposes *than EPA's present interpretive regulations afford.*" See H.R. Rep. No. 95-294, *supra*, at 211 (emphasis added), 4 *Leg. Hist.* 2678.

Surely all this makes clear that it was *not* the Congress's purpose simply to codify the approach of the 1976 or 1977 Senate bills or the 1976 Emissions Offset Ruling. Indeed, Congress wished the States to have *more* flexibility to create a balanced approach in accommodating growth to the achievement of attainment than the 1976

Ruling permitted. Given this explicit statement, it would surely be remarkable to conclude that the Congress in 1977 sub silentio froze into place the 1976 Ruling's ambiguous bar against a plantwide approach to the NSR permit program.

We do not argue here that the evidence shows that a plantwide approach was expressly in mind when the Conference adopted the House version and eliminated the textual phrases that might have restricted the Administrator's discretion to afford the states this form of flexibility. Although there is some indication that Congress was aware of the need for administrative discretion in implementing the NSR program,[61] and although in the debates references were made to an *entire* plant or facility as constituting a "source," [62] a balanced reading of the legislative history leads to the conclusion that nobody in Congress focused sharply or pointedly on the difference between a plantwide or a dual definition. Congress simply did not address or resolve this issue.

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[61] The 1977 Senate Report stated that EPA "must be given some discretion" to identify those situations in which "new facilities * * * will prevent attainment or maintenance of a national air quality standard" and thus "requir[e] the most rigorous assessment and stringent limitations" (S. Rep. No. 95-127, *supra*, at 56, 3 *Leg. Hist.* 1430).

[62] For instance, Representative Waxman referred to a "stationary source" as "utilities, refineries, smelters and so forth," and he mentioned that "stationary sources" that were out of compliance with emissions limitations included "coal-fired powerplants, * * * steel complexes, * * * nonferous smelters, * * * large refineries, * * * commercial boilers, and * * * municipal boilers * * *." 123 Cong. Rec. 16202 (1977), 4 *Leg. Hist.* 3050, 3051. Senator Muskie referred to "a powerplant" as a "source." 123 Cong. Rec. 18023 (1977), 3 *Leg. Hist.* 730; see also 123 Cong. Rec. 18035 (1977), 3 *Leg. Hist.* 763 (chart). Similarly, Senator McClure submitted for the record an EPA memorandum that listed "source categories" including lime plants, sulfur recovery plants, carbon block plants, pulp mills, copper smelters, petroleum refineries, cement plants, and iron and steel mills. 122 Cong. Rec. 24549 (1976), 6 *Leg. Hist.* 5262-5263.

If we are correct in this conclusion, what is its consequence for this case? We submit that the answer is clear. Congress legislates in full contemplation of the conventional rule that the Administrator is deemed to have authority in normal course to construe and implement the statute with respect to matters not legislatively determined. Congress made it clear that in doing so, the Administrator should adopt a balanced approach to the problem of accommodating growth to attainment, and should leave the states some flexibility in their implementation of attainment programs. Since EPA exercised its discretion by adopting a regulation that is reasonably designed to effectuate the various policies of the Act, that leaves states a sensible flexibility to adapt their attainment programs to local conditions, and that holds air quality harmless on the road to attainment, its regulations should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1983

ADDENDUM

40 C.F.R. 51.18(j) provides in pertinent part:

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

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Nos. 82-1005, 82-1247, 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A., INC.,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*

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October 28, 1983

QUESTION PRESENTED

Whether the Clean Air Act permits the Environmental Protection Agency to redefine the term "stationary source" to mean whole industrial plants only, and thereby to exempt major new units built within plants (such as boilers and blast furnaces) from pollution control requirements established by the Act.

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CHEVRON U.S.A., INC.,
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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
AMERICAN LUNG ASSOCIATION OF NORTHWESTERN OHIO, INC.,
Respondents.

INTRODUCTION

Millions of Americans live in areas of the country where minimum federal standards for healthful air quality are still violated. Because public health is at stake, the Clean Air Act, 42 U.S.C. §§7401 *et seq.*,[1] imposes its most demanding requirements on pollution sources located in these areas.

Special requirements for new industrial sources, over and above those applicable to existing sources, have always been central to the Act's program for meeting the public health standards. Since 1970, the Act has required new or modified

[1] All citations to current provisions of the Clean Air Act are to Supp. V of the U.S. Code. References to provisions of the 1970 Act which were subsequently amended are given to Pub. L. No. 91-604, 84 Stat. 1676 (1970), by their Statutes at Large citation.

"stationary sources" to undergo a special locational review prior to construction in areas with unhealthy air.[2] The Act defined "stationary source" to include any discrete unit of production, regardless whether located on its own or within a larger industrial plant: "any building, structure, facility or installation" which emits pollution.[3] In 1977, Congress amended the preconstruction review program to impose additional specific pollution control requirements on new or modified "*major* stationary sources" (defined as sources emitting more than 100 tons of pollution per year) locating in such areas. These requirements are implemented through a permit process known as new source review.[4]

The issue presented by this case is whether Congress granted the Environmental Protection Agency (EPA) authority to change the long-established definition of "stationary source," and thereby to greatly narrow the scope of the Clean Air Act's new source review requirements.

The issue may be crystallized as follows. All of the parties agree that if a company wishes to build a new industrial structure or unit which will emit more than 100 tons of pollution per year (*e.g.*, a large boiler, a blast furnace, or the like) at a *new site* in an area violating the health standards, this project is a "major stationary source." All parties agree that as such, the project is subject to five statutory requirements:

First, the state must have a *complete air pollution control program*; it must have adopted, and EPA must have approved, a State Implementation Plan (SIP) meeting all requirements of the Act.[5] States lacking complete control programs may not allow major new sources to be constructed in areas violating the health standards. Section 110(a)(2)(I), 42 U.S.C.

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[2] Sections 110(a)(2)(D) & (a)(4), 84 Stat. 1680, 1681, 1683.

[3] Section 111(a)(3), 42 U.S.C. 7411(a)(3).

[4] Sections 110(a)(2)(D) & (I), 172(b)(6) & (11), 173, 302(j), 42 U.S.C. §§7410(a)(2)(D) & (I), 7502(b)(6) & (11), 7503, 7602(j).

[5] See Sections 110, 172, & 173, 42 U.S.C. §§7410, 7502, & 7503.

§7410(a)(2)(I).[6] This condition spurs industry and state cooperation to adopt complete SIPs.

Second, the company must *offset* the new source's pollution by reducing pollution from an existing source by a greater amount. Section 173(1)(A), 42 U.S.C. §7503(1)(A).[7] The offset assures that all major new sources reduce pollution rather than increase it.

Third, the company must assure that the new source complies with the "*lowest achievable emission rate*," a state-of-the-art pollution control requirement intended to maximize the number of new sources that may be built consistent with protecting public health. Section 173(2), 42 U.S.C. §7503(2).[8]

Fourth, the company must demonstrate *company-wide compliance*: that all commonly-owned existing sources in the the same state are complying with the emission limits applicable to them. Section 173(3), 42 U.S.C. §7503(3). This requirement gives firms a clear incentive to comply with the law at their existing sources.

Fifth, in areas granted an additional five year extension to meet the standards,[9] the company must demonstrate (after considering alternative sites, sizes, production processes, and emission controls) that *the benefits of the source exceed its environmental and social costs*. Section 172(b)(11), 42 U.S.C.

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[6] Under this provision, if a complete SIP was not in place by mid-1979, then a temporary moratorium on constructing or modifying "major stationary sources" was to come into effect. It ends when the deficiencies are cured. The construction moratorium also comes into effect if a state does not carry out its plan. Section 173(4), 42 U.S.C. §7503(4).

[7] The offset requirement applies unless the SIP contains a "growth allowance" sufficient to accomodate new sources and still meet the health standards. Sections 172(b)(5), 173(1)(B), 42 U.S.C. §§7502(b)(5), 7503(1)(B).

[8] The "lowest achievable emission rate" is defined as the most stringent emission limitation for a like source which is required by any state or achieved in practice. Section 171(3), 42 U.S.C. §7501(3).

[9] The health standards for three of the pollutants must be attained by December 31, 1982. If additional requirements (including the above-described cost-benefit test) are put in place, areas may have until December 31, 1987, to meet two other standards. Section 172(a), 42 U.S.C. §7502(a).

§7502(b)(11). This most intense scrutiny of new sources is in exchange for the extra time for attainment.

As stated above, all parties agree that all five conditions must be met before the new unit emitting 100 tons of pollution per year may be constructed at a new site. Our disagreement is whether the Clean Air Act treats this project any differently if it happens to be built not at a new site, but within a *pre-existing plant*.

Respondents contend that exactly the same rules apply to the 100-ton-per-year unit built within a plant. For 10 years, until the October 1981 rules change here under review, the regulations of the Environmental Protection Agency agreed.[10]

Now, however, EPA and the industrial petitioners contend that completely different rules apply to such a unit. The petitioners assert that upon *partial* fulfillment of only *one* of the five conditions on construction of a "major stationary source," the unit built within a plant is no longer a "major stationary source" at all. It may then be built without any regard for the four other conditions.

Under the new EPA rules, the unit built within an existing plant completely avoids being a "major stationary source" merely by securing a partial emissions offset from other sources in the plant. The intra-plant reduction does not even have to equal the pollution increase from the new unit. Where the statutory offset condition requires a net decrease in pollution, the new EPA rules allow total pollution to increase. Net increases of 25 to 100 tons per year are treated as though they simply did not occur.[11]

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[10] See pages 15-19, *infra*.

[11] 40 C.F.R. Part 51, App. S, II(A)(13), 40 C.F.R. §§51.18(j)(1)(xiii), 52.24(f)(13). These plant-wide emission increases may be *repeated* every five years or less. See 40 C.F.R. Part 51, App. S, II(A)(7)(ii), 40 C.F.R. §§51.18(j)(1)(vii)(*c*)(*1*), 52.24(f)(7)(ii).

The petitioners frequently claim that the substance of the first condition (a complete SIP) is also being observed. They claim that EPA allows use of the plant-wide "source" definition only when a SIP is in place which assures timely attainment of the standards and reasonable further progress

(footnote continues)

The exemption of units built within plants is not an academic issue, for in areas with unhealthy air more than *90 percent* of the new projects that themselves emit 100 tons or more per year are built within existing plants.[12] Nearly all such projects can obtain an intra-plant emission reduction sufficient to keep the plant's net emissions from growing by more than 25-100 tons per year.[13] Previously these projects were covered by all five statutory conditions on construction or modification of "major stationary sources." Now they are all exempt.[14]

(footnote continued)

in the interim. This is not so, however. The EPA rules allow use of the plant-wide definition even in areas which have failed to adopt *any* SIP. Such areas are supposed to be subject to a moratorium on construction of "major stationary sources." Section 110(a)(2)(I), 42 U.S.C. §7410(a)(2)(I). But since a unit within a plant is no longer considered a "major stationary source" so long as it has a partial offset, the moratorium is evaded.

[12] For example, in the San Francisco Bay Area, there were 46 major additions or modifications to major existing plants built between December 1977 and January 1982; only one new major source was constructed in this period at a virgin site. Declaration of Jeff Gabe, Research Director, Citizens for a Better Environment (San Francisco), ¶11 (Jan. 1982) (J.A. 170). Nationwide, EPA recorded more than 590 major additions to or modifications at existing plants in nonattainment areas between 1976 and 1980, and no more than 14 instances in which a major new project was built in such areas at a wholly new site. EPA, "Emissions Offsets, Banking, and Trading Update (Feb. 1980)", cited in Gabe Declaration.

[13] In the cases tallied in the prior note, 590 out of 604 major stationary sources obtained their *greater-than-even* offsets from other sources within the same plants. *A priori*, under the present rules they could have obtained *partial* offsets and evaded being "major stationary sources" to begin with.

[14] The plant-wide "source" definition is a serious abuse of the "bubble concept," a regulatory approach under which groups of independent sources are treated as part of a single, larger whole and allowed to trade emission limits among themselves. While the bubble concept does have valid applications under the Clean Air Act, it may *not* be used to let sources escape specific statutory requirements. Yet that is exactly what the plant-wide "source" definition does.

All three *amici curiae* for the petitioners discuss wholly different applications of the bubble concept. Without implying a judgment on the specific bubbles discussed in their briefs, respondents note that the legality of each other type of the bubble will have to be evaluated on its own merits. Those, however, are cases for another day.

What statutory support do the petitioners offer for treating new major-emitting units built within plants differently from new major-emitting units built on their own? What support do they offer for allowing units built within plants to evade four of the five statutory conditions merely by partially complying with one of them? The petitioners do not claim the Clean Air Act mandates this result; they cannot even point to any provisions authorizing it. All they claim is that the Act does not specifically *preclude* their construction.

The petitioners are wrong even in this, however. We will show that the plant-wide "source" definition is prohibited by the provisions, legislative history, and purposes of the Clean Air Act. We will show that Congress specifically intended "major stationary source" to cover discrete major-emitting units regardless whether located on their own or within plants. We will show that for 10 years, until the 1981 rules change, EPA agreed. Because the plant-wide "source" definition is contrary to law and a sharp, unjustified break with long-standing regulations, the decision of the Court of Appeals should be affirmed.

STATEMENT OF THE CASE

The petitioners' statements of the case seriously misrepresent the legal provisions and regulatory history bearing on the Clean Air Act's new source review requirements. According to their version of the story, the curtain rises only with the 1977 amendments, which they assert to be indefinite, and with regulatory notices issued in 1979, which they claim were EPA's earliest pronouncement on the issue. Asserting the existence of a *tabula rasa* as late as 1979, the petitioners claim that the plant-wide definition of "stationary source" was EPA's first and considered construction of a term Congress left undefined. EPA's 1980 regulations are then characterized as only a brief and aberrant diversion from this construction, to which EPA returned in 1981.

This version of the story could hardly be further from the truth. The government, in particular, plays the unseemly role of a willing amnesiac.

In fact, the story of the Act's new source review requirements begins with the Clean Air Act of 1970 and with regulations dating from 1971. From 1970 to the present, the Act has mandated a specific state program for review of new and modified "stationary sources," and this term has always included discrete units of industrial production and pollution such as boilers and blast furnaces. From 1971 until the 1981 rules change at issue here, EPA's regulations faithfully tracked the provisions of the Act. Only in 1981 did EPA change course.

A. THE STATUTORY FRAMEWORK

1. The 1970 Act

New source review requirements covering discrete industrial facilities were first adopted in the 1970 Clean Air Act.[15] The Act directed each state to adopt a "State Implementation Plan" (SIP) to achieve National Ambient Air Quality Standards set at levels necessary to protect public health and the environment by 1975.[16] Certain specific elements, including a new source review procedure, were mandatory in each SIP. Under Sections 110(a)(2)(D) and 110(a)(4),[17] each SIP had to contain a procedure for reviewing the location of "any new source to which a standard of performance under section 111 will apply," and for blocking construction at any site where the source would prevent attainment or maintenance of the National Ambient Air Quality Standards.[18]

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[15] Pub. L. No. 91-604, 84 Stat. 1676. Citations to provisions subsequently amended are given to Statutes at Large; citations to sections which have not been changed are to the current codification.

[16] The National Ambient Air Quality Standards were to be set by EPA pursuant to Section 109(a) & (b), 84 Stat. 1679-80. "Primary" standards are to protect public health; "secondary" standards are to protect the natural and man-made environment. The 1975 deadline was fixed in Section 110 of the Act; limited extensions were available until 1977. Section 110(a)(2)(A), (e), 42 U.S.C. 84 Stat. 1680, 1682. The requirements for the State Implementation Plan were set forth in Section 110(a)(2)(A)-(H), 84 Stat. 1680-81. As currently amended, these provisions are codified at 42 U.S.C. §§7409, 7410.

[17] 84 Stat. 1680, 1681. In amended form these provisions are found at 42 U.S.C. §7410(a)(2)(D), (a)(4). See pp. 10-11, *infra*.

[18] See Hancock v. Train, 426 U.S. 167, 194 (1976).

The term "source" was explicitly defined in Section 111. Under Section 111(a)(3), a "source" was, and still is, "any building, structure, facility, or installation" which emits or may emit air pollution.[19] These terms denote discrete industrial units of production and operation.

After a New Source Performance Standard (NSPS) is set for a category of such sources under Section 111, they become subject to the locational review under Section 110(a)(2)(D) and (a)(4). Neither the NSPSs nor the locational review may be avoided through a plant-wide source definition. See *ASARCO v. EPA*, 578 F.2d 319 (D.C. Cir. 1978).[20]

Although significant progress was made under the 1970 Act, its requirements proved insufficient to protect the public health. The limited specific elements then required in each SIP, including the locational review for new sources, had turned out to be inadequate.[21] Nearly all the SIPs had projected that the health standards would be met on time. When the 1975 deadline passed, however, areas of the country containing

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[19] 42 U.S.C. §7411(a)(3).

[20] The only deviation from this rule was struck down in *ASARCO*. In New Source Performance Standards issued in 1974 for the nonferrous smelting industry, EPA partially adopted the plantwide "source" definition. The plantwide definition allowed *modifications* of the major smelting units (furnaces, copper converters, roasters, and the like) to evade the NSPSs by offsetting their emissions elsewhere in the plant. Wholly new units, however, remained subject to the standards. In *ASARCO*, this regulation was held contrary to the terms of Section 111(a)(3) and to the pollution-reducing purpose Congress had established for the NSPSs. *ASARCO* was not appealed, and no party to this case disputes the decision.

[21] As the 1977 Senate Report stated:

> A major weakness in the implementation of the 1970 Act has been the failure to assess the impact of emissions from new sources of pollution on State plans to attain air quality standards by statutory deadlines. States have permitted growth on the assumption that a deadline was sufficiently distant so that future emissions reductions could be made to compensate for initial increases. It can now be seen that these assumptions were wrong.

S.Rep. No. 127, 95th Cong., 1st Sess. 35 (1977), 3 *A Legislative History of the Clean Air Act Amendments of 1977* 1429 (Sen. Comm. on Environment and Public Works, Ser. No. 95-16, 1978) (hereinafter cited as *Leg. Hist.*).

more than two-thirds of the U.S. population still suffered air pollution in violation of one or more of the health standards.[22]

2. The 1977 Amendments

Work on comprehensive amendments to address the shortcomings of the 1970 Act began in 1975. One of the central problems before Congress was on what conditions to allow the construction of new or modified sources in areas where the 1975 deadline for attainment had passed unmet. A bill addressing this problem passed both the Senate and House and their conference committee in 1976,[23] but was killed by a post-conference filibuster on another issue.[24] To fill the gap until Congress could take final action, in December 1976 EPA adopted an interpretative regulation governing new sources, known as the "Emission Offset Interpretative Ruling."[25] Legislation closely patterned on the 1976 bill and the Offset Ruling was enacted in 1977.[26]

The 1976 bill contained a general bar on construction or modification of any "major emitting facility" (defined as any "stationary source" emitting more than 100 tons of pollution per year[27]) in an area with unhealthy air. The bill provided a narrow exception, however, for "a facility proposed for construction or modification at an existing site or plant." Such a facility could go forward if the firm met three conditions. The firm had to use the best technology, demonstrate

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[22] Report of the National Commission on Air Quality, pp. 3.3-20 through 3.3-33 (Preliminary Staff Draft, Jan. 15, 1981) (The Commission was established in 1977 under Section 323 of the Clean Air Act, 42 U.S.C. §7623, to report on progress under the Act.)

[23] S. 3219, reprinted in H.R. Rep. 1742, 94th Cong., 2d Sess. (1976). See 5 *Leg. Hist.* at 4287.

[24] The filibuster, led by Senator Garn, was focused on the program to protect air quality *better* than required by the federal health and welfare standards. See the floor debate, 5 *Leg. Hist.* at 4411-4500.

[25] 41 Fed. Reg. 55,524 (1976), J.A. 8.

[26] Pub. L. No. 95-95, 91 Stat. 685.

[27] S. 3219, §33 (adding §302(k) & (m)), 94th Cong., 2d Sess. (1976), 6 *Leg. Hist.* at 4686-88.

that its other sources are in compliance with applicable requirements, and offset the new facility's emissions by reducing pollution at other facilities by a greater amount.[28] The bill distinguished between "facilities," on the one hand, and "sites," "plants," and "facility locations," on the other hand.[29]

When this bill failed to pass, EPA adopted the Emission Offset Interpretative Ruling. 41 Fed. Reg. 55,524, J.A. 8. The ruling closely followed the 1976 bill. It allowed construction of major new and modified sources on conditions virtually identical to the 1976 bill. The Offset Ruling is discussed further at pages 16-17, *infra*.

Amendments to the Clean Air Act were enacted in 1977.[30] Congress extended the deadlines for meeting standards to 1982 for most areas, 1987 for others.[31] At the same time, Congress substantially strengthened the specific elements

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[28] S. 3219, §11, 6 *Leg. Hist.* at 4652-53. The provision required the proponent of such a facility to demonstrate (A) that "the best available technology . . . applicable to such proposed facility" will be used, (B) that "all existing facilities owned or controlled" by the same firm "are in compliance with an approved schedule and timetable for compliance," (C) that "total cumulative emissions from the facility location and the proposed facility will at no time increase," and (D) that "total allowable emissions from all existing and proposed sources at the facility location will be sufficiently less than the total allowable emissions from the existing sources . . . so as to represent reasonable further progress toward attainment of the applicable national ambient air quality standard."

[29] *Id.*

[30] Pub. L. No. 95-95, 91 Stat. 685. Its "nonattainment" provisions were contained in Sections 108 & 129, 91 Stat. 693-97, 745-50, codified at 42 U.S.C. §§7410, 7501-08.

[31] Section 172(a), 42 U.S.C. §7502(a). The extension to 1987 was limited to areas with special problems meeting standards for ozone or carbon monoxide. The 1982 and 1987 deadlines remain outside limits; SIPs are to provide for attainment "as expeditiously as practicable" but not later than these dates. To help deter states from again leaving the bulk of the necessary pollution reductions to the last minute and then once again falling short, the SIPs must provide for "reasonable further progress," Section 172(b)(3), 42 U.S.C. §7502(b)(3), defined as regular increments of emission reductions sufficient to meet the standards on time. Section 171(1), 42 U.S.C. §7501(1).

required in each SIP.[32] Foremost among these were expanded requirements for major new and modified sources. Amalgamating the provisions of the 1976 bill and the EPA Offset Ruling, Congress enacted the review and permit provisions of the current law. See Section 110(a)(2)(D), as amended, and new Sections 172(b)(6), 173, 42 U.S.C. §§7410(a)(2)(D), 7502(b)(6), 7503.

Each state was required to revise its SIP by 1979. In addition to the locational review mandated by the 1970 Act, Section 110(a)(2)(D) now requires each SIP to include a program for

> regulation of the modification, construction, and operation of *any stationary source*, including a permit program as required in parts C and D of this subchapter . . . .

42 U.S.C. §7410(a)(2)(D) (emphasis added). The permit program required by Part D is set forth in Section 172(b)(6), which provides that each SIP must "require permits for the construction and operation of new or modified major stationary sources in accordance with section 173. . . ." A "*major* stationary source" is defined as "any stationary facility or source" emitting at least 100 tons of pollution per year. Section 302(j), 42 U.S.C. §7602(j).

Section 173 sets forth the three conditions, drawn directly from the 1976 bill and the Offset Ruling, under which a state may issue a permit for construction and operation. Paragraph (1)(A) requires the owner of the major source to secure an

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[32] Forced to extend the attainment dates by the widespread failure to implement the necessary pollution controls, Congress was more convinced than ever that it was insufficient to rely solely on deadlines and progress requirements. Consequently, Congress required the SIPs to incorporate upgraded controls on existing stationary sources to represent "at a minimum," "reasonably available control technology." Section 172(b)(3), 42 U.S.C. §7502(b)(3). All other "reasonably available control measures" had to be taken. *Id.* Most important for this case, the SIP must contain an expanded and more stringent permit program for new and modified "major stationary sources."

emissions "offset" that accomplishes a net reduction in emissions.[33] Paragraph (2) requires compliance with the "lowest achievable emission rate" (LAER).[34] Paragraph (3) requires the source owner to demonstrate that its existing sources are subject to, and in compliance (or on schedules for compliance) with, their pollution limits.

The amendments provided a means for states to waive one, and only one, of the permit requirements. Under Section 173(1)(B) a state may eliminate the offset requirement if, pursuant to Section 172(b)(5), the state creates a "growth allowance."[35] A growth allowance is created by requiring extra emission reductions from existing sources, beyond those needed for bare attainment of the health standards. Under no circumstances, however, may a state waive the "lowest

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[33] Section 173(1)(A) requires that:

> by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress (as defined in section 171). . . .

[34] The "lowest achievable emission rate" (LAER) is defined as equal to the lowest pollution rate actually being achieved by an existing source of the same type, or as equal to the lowest rate required of such a source by any state, whichever is lower. As an absolute floor, LAER may not allow more pollution than the applicable New Source Performance Standard (NSPS), if one has been set for that type of source. Section 171(2), 42 U.S.C. §7501(2). The legislative history indicates that the states and EPA may consider the cost of controls when determining LAER, but in view of the health interests at stake, they must give cost less weight than when setting NSPSs. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 215, 4 *Leg. Hist.* 2682.

[35] Section 173(1)(B) allows a waiver of case-by-case offsets if:

> emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emission levels which exceed the allowance for growth permitted for such pollutant for such area from new or modified stationary sources under section 172(b). . . .

achievable emission rate" or company-wide compliance requirements. These requirements must be met by major new and modified sources even in a nonattainment area whose SIP has a growth allowance.

States seeking a deadline extension to 1987 must include an additional new source requirement in their SIPs. The state must prepare "an analysis of alternative sites, sizes, production processes, and environmental control techniques" for each new or modified "major stationary source." For the source to proceed, the analysis must demonstrate "that the benefits of the proposed source significantly outweigh [its] environmental and social costs." Section 172(b)(11), 42 U.S.C. §7502(b)(11). This most intense scrutiny of major new and modified sources reflects Congress' judgment that even the conditions imposed by Section 173 were inadequate if public health was to continue in jeopardy so long.

To govern during the interim period until the states revised their SIPs, Congress adopted the EPA Offset Ruling directly into law. Pub. L. 95-95, 129(a), codified as a note to 42 U.S.C. §7502. When complete SIPs are in place, their permit provisions take over.

If the required SIP revisions were not completed on schedule, the amendments provided that no "major stationary source" may be constructed or modified after July 1, 1979, if it would emit a pollutant for which an area has unhealthy air. Section 110(a)(2)(I), 42 U.S.C. §7410(a)(2)(I). Once the SIP is approved by EPA, the moratorium on major source construction returns if the state is not carrying out the plan. Section 173(4), 42 U.S.C. §7503(4).[36]

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[36] While the industry petitioners suggest dire economic consequences flow from the moratorium, the National Commission on Air Quality found it to be an effective spur to state action with little adverse economic impact: "[M]oratoriums continue to have little effect on new sources, but stimulate completion of required plan revisions." National Commission on Air Quality, *To Breathe Clean Air*, Finding 91, pp. 16-17 (1981).

3. The 1981 Amendments

The final chapter in the legislative story was the enactment of a special amendment to the Clean Air Act, the Steel Industry Compliance Extension Act,[37] in July 1981. The legislative history of this amendment reaffirms the established scope of the Act's permit provisions.

The steel amendment allows iron and steel companies more time to meet emission limits applicable to some of their existing sources, provided the companies meet certain carefully drawn conditions. The principal conditions are that they take certain steps to protect air quality in the interim, and that they put the money saved by deferring compliance into modernization of facilities. Section 113(e), 42 U.S.C. §7413(e), 95 Stat. 139-42 (1981).

The legislation was the product of an unusual direct negotiation between the steel industry, labor, the government, and environmentalists.[38] One article of this agreement was that modernization projects involving the construction or modification of units such as blast furnaces, coke ovens, and the like were each "major stationary sources" subject to the permit requirements of Section 173. See Brief of *Amicus Curiae* United Steelworkers of America.

This agreement is reflected in the House Report, which states:

> [T]he program to modernize facilities will also continue to include the application of lowest achievable emission rate technology (LAER) on the modernized facilities. . . .[39]

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[37] Pub. L. No. 97-23, 95 Stat. 139 (1981), codified as amendments to Section 113 of the Clean Air Act, 42 U.S.C. §7413.

[38] "The bill reflects an historic agreement hammered out last September between representatives of the steel companies, the steelworkers union, . . . the environmental groups, and the Environmental Protection Agency." 127 Cong. Rec. H2449 (daily ed. May 28, 1981) (remarks of Rep. John Dingell, chairman of the committee reporting the bill).

[39] H.R. Rep. No. 121, 97th Cong., 1st Sess. 12 (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 63.

The Report then gives examples of the type of projects that would be subject to LAER and the other new source permitting requirements:

> It is anticipated that the industry will use the opportunity to modernize the American steel industry by building modern *continuous casters*, converting *open hearth shops* to *basic oxygen furnaces* or undertaking similar projects to improve the competitive posture of the industry.[40]

Each type of project mentioned is a unit within a plant, not a plant itself. The steel amendments, enacted just as EPA moved to abandon the unit-specific "source" definition, point in exactly the opposite direction.

B. THE REGULATORY HISTORY

From 1971 until the 1981 rules change, EPA's new source review regulations applied to individual units, regardless whether built at new sites or within existing plants. This is evident in regulations published in 1971, 1973, 1976, 1979, and 1980. A deviation from this course was proposed in 1979 but never promulgated; the regulations adopted in 1980 maintained the historical scope of the review provisions.

1. The 1971 and 1973 Regulations

EPA first issued regulations to implement the locational review in 1971. 40 C.F.R. Part 51, 36 Fed. Reg. 22,398, (1971).[41] Under the title, "Review of New Sources and Modifications," the regulations required each SIP to provide for review of "a new stationary source" or "an existing source which is to be modified." 40 C.F.R. §51.18(b), 36 Fed. Reg. 22,404. While no definition of "stationary source" was included in the regulations, reference obviously was intended to the statutory definition found in Section 111(a)(3). As

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[40] *Id.* (emphasis added).

[41] The regulations were first promulgated at 36 Fed. Reg. 15,486, (1971) as 40 C.F.R. Part 420. They were recodified later in the year.

intended and as applied, the 1971 regulations applied to individual industrial units.[42]

In 1973 EPA amended these regulations; in place of the term "stationary source," EPA used the terms "facility, building, structure, [or] installation" 38 Fed. Reg. 15,836 (1973). These are the terms used in the Section 111(a)(3) definition of "stationary source."[43]

2. The 1976 Offset Ruling

As mentioned above, when a filibuster killed the 1976 bill, EPA issued the "Emission Offset Interpretative Ruling" to fill the gap. 41 Fed. Reg. 55,524, J.A. 8. The ruling was an interpretation of the existing §51.18 regulations governing the locational review of the 1970 Act. *Id.* at 55,528, J.A. 20. The ruling set forth terms on which additional sources could be built or modified in areas that had failed to meet the health standards by the 1975 deadline.

As an interpretation of §51.18, the Offset Ruling incorporated those regulations' definition of a "stationary source" as a "facility, building, structure, [or] installation." Reflecting the title of the §51.18 regulations, the Offset Ruling applied to any " 'major' new source" or " 'major' modification." A new source or a modification was "major" if it would emit at least 100 tons of pollution per year. 41 Fed. Reg. at 55,528,

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[42] Respondents would be most surprised if petitioners denied this. Traditionally, the air pollution program had always regulated discrete units of production and operation. The "bubble" concept was not even *conceived* until 1972. For the earliest history of the concept, see ASARCO v. EPA, 578 F.2d 319, 322-25 (D.C. Cir. 1978).

[43] The regulations also used a fifth term after these four, "combination thereof." This term was added to deal with a special issue unrelated to this case: regulation of "indirect sources" such as airports and shopping centers. As stated by the preamble to the proposed regulations, indirect sources are "types of facilities, such as airports, amusement parks . . . [which affect] air quality . . . primarily by means of the mobile source activity associated with them." 38 Fed. Reg. 9599 (1973). The term "combination thereof" was added to encompass such sources. Congress subsequently limited EPA's authority to require state review of indirect sources, Section 110(a)(5), 42 U.S.C. §7410(a)(5). In 1979, however, the term "combination thereof" was reemployed to deal with a different problem. See note 45, *infra*.

J.A. 21.[44] Thus, under the Offset Ruling, new or modified industrial units were subject to review if they themselves would emit 100 tons per year, regardless whether they were located at new sites or within plants.

Like the 1976 bill, the Offset Ruling allowed such sources to be constructed or modified in unhealthy-air areas only so long as it met the state-of-the-art technology, company-wide compliance, and offset conditions. *Id.* at 55,528-29, J.A. 24-26.

3. The Regulations From 1977 to 1979

While states prepared the SIP revisions required by the 1977 amendments, EPA consistently implemented the Offset Ruling to apply to units within plants. In January 1979, EPA stated that this had been its "consistent application" since 1976. 44 Fed. Reg. 3277 (1979), J.A. 44. The Agency explicitly rejected industry requests to let otherwise major new and modified sources escape the three conditions of the Offset Ruling merely by obtaining an offset within the plant. "It is not enough that there be no net increase in emissions. . . ," EPA stated. *Id.* at 3276-77, J.A. 43-44.[45]

4. The 1979 Proposal

It is only now that we come to the point where the petitioners' version of the regulatory history begins. The

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[44] The "major" level for carbon monoxide was 1000 tons per year.

[45] In this notice EPA amended its definition of "stationary source" to read as follows: "any structure, building, facility, equipment, installation or operation (or combination thereof)." 40 C.F.R. Part 51, App. S, II(A)(1), 44 Fed. Reg. 3282, J.A. 46-47. The first six terms were intended to encompass industrial units. The term "combination thereof," first used for another purpose in 1973 (see note 43, *supra*), was now put to a new use. Now that a source's emission rate determined whether it was "major" and subject to review, EPA had found that some firms were attempting to evade review by subdividing their projects on paper. In this way they kept each part below the 100 ton threshold. The purpose of adding "combination thereof" to the source definition was to curb this tactic. EPA gave the following example: "This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed. Reg. 3276, J.A. 42.

petitioners point out that in the January 1979 notice just discussed, EPA suggested that it would allow use of the plant-wide "source" definition in the context of a revised SIP that met all requirements of the 1977 amendments. 44 Fed. Reg. at 3277, J.A. 44-45. This suggestion was repeated in April and formally proposed in September. 44 Fed Reg. at 20,379; 44 Fed. Reg. at 51,933 (1979), J.A. 65-66. The petitioners further suggest that all EPA did in 1981 was promulgate this proposal. EPA Br. at 3; AISI Br. at 8-9.

The September 1979 proposal was never promulgated, however. When EPA completed the rulemaking in 1980, EPA rejected the proposal and retained the prior scope of new source review even for areas with complete SIPs.

Moreover, the the 1979 proposal did not go nearly as far as the 1981 rules change. The 1979 proposal would have allowed a plant-wide definition only within a complete SIP, and would have required the new unit's pollution increase to be *completely* offset. In contrast, the 1981 rules allow the plant-wide definition to be used even under the Offset Ruling and the construction moratorium, and they allow net pollution to increase, by 25-100 tons per year.[46]

5. The 1980 Regulations

In 1980, EPA rejected the 1979 proposal. The Agency retained the prior requirement that major-emitting units built within plants comply with the permit requirements, even within a complete SIP. EPA stated:

> The legislative history of the Act indicates that new source review was intended to be an important tool

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[46] See 44 Fed. Reg. at 51,933, J.A. 66. The January and April notices, moreover, did not go even as far as the September proposal. The January and April notices suggested allowing the *modification* of a unit within a plant to avoid new source review. This option, however, would never be available to a wholly *new* unit added to a plant. 44 Fed. Reg. 3277, J.A. 44-45; 44 Fed. Reg. 20,379. In the September notice, EPA did propose extending this option to completely new units, but still required that the emissions increase be completely offset. 44 Fed. Reg. 51,933, J.A. 65-66.

> in the drive towards attainment of the ambient air quality standards. . . . To realize this goal fully, Congress intended that new source review be applied to the greatest extent possible.

45 Fed. Reg. 52,697, J.A. 81-82. EPA quoted legislative history in which Congress expressed the important pollution-reducing functions of the requirements for lowest achievable emission rate technology and for company-wide compliance. 45 Fed. Reg. 52,697, J.A. 81. "Major stationary source," EPA concluded, must continue to be defined to encompass major-emitting units within plants. *Id.*[47]

C. THE 1981 RULES CHANGE

In March 1981, EPA proposed to change course radically and adopt an exclusively plant-wide definition of "source." 46 Fed. Reg. 16,280 (1981), J.A. 89. The Agency proposed to accomplish this result by defining all four terms which make up a "stationary source" — "building," "structure," "facility," and "installation" — to mean entire plants only. Proposed 40 C.F.R. Part 51, App. S II(A), §51.18(j)(1), §52.24(f), 46 Fed. Reg. at 16,282, J.A. 96.

The 1981 proposal went beyond even the rejected 1979 proposals. EPA no longer restricted the plantwide definition to states with fully approved SIPs; EPA adopted it for the Agency's own use under the Offset Ruling and the construction

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[47] In the wake of Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), EPA changed the terminology of the "source" definition, but not its intent. *Alabama Power* held that "stationary source" may be defined only by the four terms found in Section 111(a)(3): "building, structure, facility, or installation." This erased the additional terms EPA had included in the definition in 1979: "equipment . . . operation (or combination thereof)." This was only a formal limitation, however, for the court had then held that EPA has the authority to define the four statutory terms in reasonable ways. 636 F.2d at 396. Consequently, in the 1980 rules EPA defined "installation" to mean "an identifiable piece of process equipment," i.e., an industrial unit. 40 C.F.R. §51.18(j)(1)(ii)-(iii), 45 Fed. Reg. 52,744 (1980), J.A. 87. If an installation had emissions exceeding 100 tons per year, it was a "major stationary source" subject to the permit provisions. *Id.* §51.18(j)(1)(v).

moratorium, which apply precisely where state plans are inadequate. Moreover, where the 1979 proposals had at least required that emissions increases be offset completely, the 1981 proposal allowed firms to create net emissions increases.

The proposal was strongly opposed in comments by public health, environmental, and civic organizations[48] and by several states.[49] It was nonetheless promulgated without change in October 1981. 46 Fed. Reg. 50,766 (1981), J.A. 97. In the promulgation notice, EPA claimed that the Clean Air Act does not require the specific new source review procedure set forth in Part D if the SIP as a whole projects reasonable further progress and attainment by the deadlines. EPA also contended that the plant-wide definition "simplifies" the regulations and eliminated a "disincentive" to plant modernizations which "in some cases" may reduce pollution despite failure to observe the permit conditions. As for the construction moratorium, which applies in places *without* a complete SIP, EPA defended the reduction in the moratorium's scope with the argument that pollution would not increase "significantly." 46 Fed. Reg. 50,767-69, J.A. 102-05, 109-110.

D. THE COURT OF APPEALS DECISION

In the Court of Appeals, the petitioning public health and environmental organizations challenged the exclusively plant-wide definition of "source" on three grounds: It was contrary

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[48] See comments of Natural Resources Defense Council (J.A. 141), Environmental Defense Fund and Citizens for a Better Environment (Chicago) (Court of Appeals App. [C.A.App.] 30), Citizens for a Better Environment (San Francisco) (C.A.App. 47), Northwestern Ohio Lung Association (C.A.App. 52), and League of Women Voters of the United States (C.A.App. 63).

[49] See Comments of Commonwealth of Pennsylvania (J.A. 122), and State of Maryland (J.A. 139). Pennsylvania stated that EPA's approach was "inadequate to assure attainment" and "short-sighted." Pennsylvania particularly criticized EPA's excessive reliance on projections of future attainment and interim progress: "[T]here is considerable uncertainty regarding the adequacy of the amount of emission reductions necessary to achieve the health related standards. This ambiguity makes the [reasonable further progress and attainment demonstrations] in many cases tenuous at best." J.A. 123-24

to the terms of the Clean Air Act, to its legislative history, and to the statute's fundamental purpose of rapidly reducing pollution in order to meet the national health standards. A permit program reaching individual major industrial units of production and pollution, we argued, was a specific requirement of the Act.

The court below relied mainly on the third of these arguments. The court held the case governed by both the underlying purpose and structure of the nonattainment program. On the Act's purpose, the court stated:

> The nonattainment program's *raison d'être* is to ameliorate the air's quality in nonattainment areas sufficiently to achieve expeditious compliance with the NAAQSs [National Ambient Air Quality Standards].

Id. at 726-27 (Chev. Pet. A-19) (footnote omitted). Concerning the Act's structure, the court added:

> We further note that the permit and moratorium provisions of Part D are wholly federal requirements imposed on the states. . . . The states do not retain flexibility to submit SIPs which provide for timely attainment of the NAAQSs, but which do not contain a permit program applicable to new or modified sources. Allowing the states large leeway to define the source to which the federal requirement applies is not easily reconciled with the statutory design.

Id. at 727-28 (Chev. Pet. A-19) (citation and footnote omitted). Accordingly, the court held that "EPA's regulatory change, its employment of the bubble concept to shrink to relatively small size mandatory new source review in nonattainment areas, is impermissible." *Id.* at 720 (Chev. Pet. A-4) (footnote omitted). The court vacated the 1981 change of rules.[30]

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[30] Since the lower court decision, the two national organizations representing top state and local air quality officials have strongly endorsed the need for the unit-specific definition of "source." See letters from the

(footnote continues)

In the lower court litigation, EPA *abandoned* an empirical claim that the petitioners now seek to revive: the claim that the unit-specific "source" definition discourages modernizations and retards pollution reduction. The government's Court of Appeals brief stated (at p. 12): "EPA did not rely on this as a basis for its decision." The court nonetheless addressed the issue in a footnote, observing that EPA had failed to produce "any study, survey, or support" for the proposition that new source review under the prior source definition "retard[s] improvement of air quality *in the aggregate*." 685 F.2d at 727, n.41 (Chev. Pet. A-18) (emphasis in original).[51] Thus, "EPA's decision to implement the bubble concept, if based on this rationale, would not rise to the level of reasoned decisionmaking." *Id.*[52]

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals vacating the 1981 redefinition of "stationary source" was correct and should

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(footnote continued)

State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials to the EPA Administrator, reproduced as Appendices A & B to the brief of *Amici Curiae* States. These officials, and the *amici* states, sharply disagree with EPA's claims that the plant-wide definition is consistent with the Clean Air Act and the achievement of its public health goals.

[51] All EPA had cited in the promulgation notice were a pair of conclusory, two-page comments each alleging one specific instance in which a modernization project was said to be retarded. (J.A. 131, C.A. App. 67.) The letters offer no evidence to support their specific claims, nor do they show that the plant-wide definition benefits air quality in the *aggregate*. See pages 44-48, *infra*.

[52] The lower court also vacated EPA's repeal of the "reconstruction" rule, an action ancillary to the redefinition of "source." 46 Fed. Reg. 50,771, J.A. 116-17, repealing 40 C.F.R. Part 50, App. S, II(A)(9) & (10), 40 C.F.R. §51.18(j)(1)(ix) & (x), 40 C.F.R. §52.24(f)(9) & (10). In certain industries (such as steel-making), old facilities are often replaced through *re*construction, rather than demolition of the old source and construction of a new one. Under the rule, a reconstruction was subject to new source permit requirments whenever its cost exceeded half the cost of an entirely

(footnote continues)

be affirmed. The Agency's plant-wide definition of "source" is contrary to the terms, legislative history, and purposes of the Clean Air Act. It is also a flat reversal of the long-standing prior rule, internally inconsistent, and unsupported by the record. Deference to EPA's construction is therefore completely unwarranted.

Section 111(a)(3) of the Clean Air Act defines "stationary source" as "any building, structure, facility, or installation" which emits pollution. These are terms which denote individual units of industrial production and pollution. Section 302(j) defines a "major stationary source" as any such unit which emits at least 100 tons of pollution per year. The plainest reading of this term is that a "major stationary source" is a large "building, structure, facility, or installation."

Since 1970, "stationary sources" planned for an area with unhealthy air have been subject to the locational review required under Section 110(a)(2)(D). In 1977 Congress expanded upon the locational review, by requiring each new or modified "major stationary source" to obtain a permit and meet rigorous pollution control conditions. These requirements were set forth in amendments to Section 110(a)(2)(D) and new Sections 110(a)(2)(I), 172(b)(6) & (11) and 173. Five pollution control conditions—a complete SIP, offsets, lowest achievable emission rate technology, company-wide compliance, and (after 1982) the cost-benefit analysis—must be met before a major new or modified source may be built.

(footnote continued)

new source. This gap-filling rule dated from 1975, before the 1977 amendments. See 40 C.F.R. §60.15, 40 Fed. Reg. 58417 (1975).

In 1981 EPA advanced just one reason for repealing it: That under a plant-wide "source" definition there would be no more reconstructions. A reconstruction plan, EPA observed, would only in the rarest case be so vast as to amount to more than half the cost of an entire new plant. 46 Fed. Reg. 50,767, J.A. 103. The Court of Appeals held that the repeal of the reconstruction rule had no independent basis, and vacated it along with the "source" definition. 685 F.2d at 728 (Chev. Pet. A-19, A-20) Citing SEC v. Chenery, 332 U.S. 194, 196 (1947) and Gulf States Util. Corp. v. FPC, 441 U.S. 747, 764 (1973), the court declined to address the arguments against the rule which EPA had neither discussed nor relied on, but which were advanced only by the industry intervenors.

The petitioners fail to cite any statutory provisions or legislative history which contradict this analysis. They cannot show any congressional intention to define "stationary source" as anything other than a "building, structure, facility, or installation." They cannot show that Congress intended a "major stationary source" to be anything more complicated than a large "stationary source."

The petitioners' argument reduces to a contention that a unit built within a plant may escape status as a "major stationary source" merely by partially offsetting its pollution with reductions elsewhere in the plant. In effect, they argue that Congress intended to let a source avoid meeting five carefully crafted conditions on construction merely by incompletely complying with one of the five conditions. Petitioners cite no statutory provisions to support this notion.

The Act, in fact, provides for precisely the opposite result. The offset requirement is the only condition on construction or modification of major stationary sources that the statute permits a state to waive. Section 173(1)(B). The other four conditions are mandatory. Under EPA's rules, however, offsets are the only condition that is even partly retained; all four other conditions are allowed to go completely by the boards.

The legislative history of the 1977 amendments reinforces these conclusions from the statutory text. The 1976 bill (killed only by a post-conference committee filibuster on another issue) specifically provided that major-emitting units ("facilities") built within plants had to meet the three pollution-reducing conditions. Subsequently, EPA implemented a nearly identical review procedure through its 1976 "Offset Ruling." In 1977, Congress adopted the conditions set forth in the 1976 bill and the Offset Ruling into law.

The legislative history of the 1981 amendments, which grant the steel industry certain concessions in order to promote modernization, further emphasizes the reach of new source review. Congress made it clear that modernization projects built within plants must comply with the lowest achievable emission rate and the other permit conditions.

Each of the five statutory conditions serves a specific purpose in the program to meet the health standards. The prospect of a construction moratorium promotes industry-state cooperation, rather than confrontation, in developing complete SIPs. The greater-than-even offset requirement serves the purpose of making growth contribute to, rather than hinder, clean-up of unhealthy pollution. The lowest achievable emission rate helps lower pollution and maximizes "room" for additional growth consistent with public health protection. The company-wide compliance requirement gives firms positive reasons to bring their own facilities into compliance, rather than to fight government enforcement actions. None of these purposes is served by exempting more than 90 percent of the intended objects of these requirements from their reach.

The EPA rules discriminate between established firms and newcomers to an area. The newcomer must meet all five statutory conditions because it builds at a new site. The established firm can expand its facilities while meeting only one of the five conditions, and only partially at that. Nothing in the Act or its legislative history suggests that Congress intended to create such a distortion of economic competition.

EPA's current position reverses the regulation which had been in effect since 1971 and which, as embodied in the 1976 Offset Ruling, was specifically adopted by Congress in 1977. EPA's current position is also internally inconsistent: The Agency says a plant-wide definition will be allowed only in the context of a complete SIP; yet EPA also uses the plant-wide definition under the Offset Ruling and the construction moratorium, which apply precisely in areas whose SIPs are *not* adequate.

The petitioners reassert in this Court an empirical claim that the government abandoned in the court below: a contention that the plantwide "source" definition promotes pollution-reducing modernizations. However, although EPA claimed during the rulemaking that the prior rules "discouraged" such modernizations in "some cases," the Agency completely failed to show that the prior rules were counter-productive in the *aggregate*. EPA did not even address this question.

Because the Agency "failed to consider an important aspect of the problem," *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 2867 (1983), the Court of Appeals properly held EPA's empirical claim arbitrary.

The Court of Appeals also correctly struck down EPA's repeal of the "reconstruction" rule. EPA's basis for this repeal was completely dependent on the validity of changing the "source" definition. Because it had no independent basis, the repeal of the "reconstruction" rule must fall as well.

For these reasons the decision below should be affirmed.

ARGUMENT

I. THE CLEAN AIR ACT REQUIRES EACH NEW OR MODIFIED INDUSTRIAL UNIT WHICH EMITS 100 TONS OF POLLUTION PER YEAR TO OBTAIN A PERMIT, REGARDLESS WHETHER IT IS LOCATED BY ITSELF OR WITHIN A PLANT

The petitioners' argument depends on the incorrect premise that the Clean Air Act does not define the meaning of the terms "stationary source" and "major stationary source" and does not specify the scope of the new source review and permitting provisions. Having assumed a statutory ambiguity, they then contend that EPA's interpretation should be deferred to. Their deference argument fails, however, because the provisions of the statute, the legislative history, and the congressional expressions of purpose are *not* ambiguous: In areas which do not meet the health standards, the Act's requirements apply to all major industrial units such as boilers and blast furnaces, regardless whether they are built at new sites or in pre-existing plants.[33]

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[33] "Although an agency's interpretation of the law under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute as revealed by its language, purpose, and history.'" Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). A plea for deference "is not an argument

(footnote continues)

A. The Definitions of "Stationary Source" and "Major Stationary Source" Show That New and Modified Units Which Emit 100 Tons Per Year Are Subject to Review

The scope of new source review in areas with unhealthy air is apparent in definitions of "stationary source" and "major stationary source." A "stationary source" is defined in Section 111(a)(3) as "any building, structure, facility, or installation" which emits or may emit air pollution. The definition is disjunctive; an industrial project which is any one of these four terms is a "stationary source." The terms clearly denote the industrial units which make up a plant, not the plant itself. A "building" cannot be a plant-wide combination of buildings. A "structure" cannot be a plant-wide collection of structures. "Facility," as explained at page 33, *infra*, was the term used by Congress in 1976 specifically to mean new or modified units within a plant, as opposed to the plant itself. "Installation" is the very term EPA used for this purpose in 1980.

The Section 111(a)(3) definition governs the scope of the locational review established in 1970 by Section 110(a)(2)(D) and (a)(4). SIPs must contain "adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 of this title will apply," if the source would interfere with attaining the health standards. See pages 7-8, *supra*.

Congress used the same words, "stationary source," in the 1977 amendments to Section 110(a)(2)(D) which expanded the new source review requirements to their current form. As amended, Section 110(a)(2)(D) requires each SIP to contain,

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(footnote continued)

of sufficient force . . . to overcome the clear contrary indications of the statute itself," Securities & Exchange Comm'n v. Sloan, 436 U.S. 103, 117 (1978), and cannot prevail when "inconsistent with an obvious congressional intent," Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 95 (1973). An agency's demand for deference does not blunt the thoroughness of the Court's review of the law and legislative materials. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

in addition to the locational review, "a program to provide for . . . regulation of the modification, construction, and operation of any stationary source, including a permit program as required in part[] . . . D of this subchapter."

The Part D permit program is established by Section 172(b)(6), which states that each SIP must require permits for the construction and operation of "new or modified major stationary sources" in accordance with the conditions set forth in Section 173. "Major stationary source" is defined in Section 302(j) as any "stationary facility or source" which emits at least 100 tons of pollution per year.[54]

The plainest reading of these provisions is that a "*major* stationary source" is simply a large "stationary source:" a "building, structure, facility, or installation" which emits 100 tons or more per year. This reading comports with the ordinary presumption that a word has the same meaning when used throughout a single statute.[55] It also makes perfect sense: Congress intended to target the 1977 amendments' more stringent pollution controls on larger sources; smaller ones remain subject only to the 1970 Act's locational review.

EPA claims that "[a]s a matter of linguistic analysis" all four of the Section 111(a)(3) terms "can be" defined as an

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[54] Section 302(j) defines two terms, "major emitting facility" (the term used in the Part C Prevention of Significant Deterioration provisions) and "major stationary source" (the term used in the Part D nonattainment provisions). The two terms are equated and defined as "any stationary facility or source" which emits or may emit 100 tons per year or more.

[55] This was the conclusion of the Court of Appeals in Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), which held that the Section 111(a)(3) definition of source governs under the Prevention of Significant Deterioration (PSD) provisions of the Act, and that therefore EPA could not supplement the four statutory terms, "building, structure, facility, or installation" (see page 19, n.47):

> Given no expression of any contrary intent in the Act or in the legislative history, we must assume that the meaning of a particular term is to be consistent throughout the Act. This is especially true under the present circumstances, where the subject term prior to enactment of the controversial language had assumed a particular definition under closely related statutory provisions.

636 F.2d at 396.

entire plant. EPA Br. at 44, n.56.[56] Respondents are unaware of any techniques of "linguistic analysis" which can overcome

[56] EPA's reliance on *Alabama Power* as authority for this claim is totally misplaced. *Alabama Power* said that EPA could reasonably define *two* of the four terms ("facility" and "installation") "broadly enough" to encompass a plant. 636 F.2d at 396. The court did *not* suggest that the terms "building" or "structure" could be so defined. The court's selection of only the terms "facility" and "installation" as susceptible of a plant-wide definition strongly suggests that the court did not feel the two other terms could be so construed.

Under the court's holding, EPA *may* define "facility" and "installation" as plants, but nothing in the court's opinion suggests that EPA may define the terms "building" or "structure" as anything but units. Thus, the court's decision recognizes that the statutory definition of "source" is broad enough to cover two types of sources: individual units, which are covered by the terms "building" or "structure," and collections of units, which can be covered by the terms "facility" or "installation." Contrary to the government's final assertion in its note 56, that places the dual definition adopted for the unhealthy-air areas in 1980 well within EPA's authority. What EPA may not do, however, is define all four terms to mean *only* plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition.

The reason to define two of the terms "broadly" was not to exempt projects from review, but to *assure* their review. This is why EPA had adopted the "combination" definition. See page 19, n.47, *supra*. The court ruled out the "combination" definition, but held the EPA had discretion to accomplish the same purpose by defining "facility" or "installation" as "broadly" as a plant. *Id.*

The court's "source" holding implicitly recognizes the statutory limit on the use of the "bubble" concept to avoid review—a limit which is not immediately apparent when the court's discussion of the "bubble" several pages later is read in isolation. Whether a "modification" occurs depends on whether the net emissions of a source have increased. The court specifically recognized, however, that netting is limited to increases and decreases within the same source: "[T]he offsetting changes must be within the same source, as defined by EPA." *Id.* at 402.

New source review is triggered only if a *major* source is modified. Under the dual definition suggested by the court, the source can be both the unit being changed and the plant in which it is located. If the plant as a whole is a major source, but the unit itself is not, then review is triggered by the change in the unit only if plantwide emissions increase. The firm may avoid review by reducing emissions elsewhere in the plant. But if the unit itself is a "major" emitter, then netting is limited to that unit alone. If its emissions increase, review is required. The same analysis applies to the addition of a wholly new unit within a plant; the firm may avoid review by reducing emissions elsewhere in the plant only if the new unit itself is not a "major" emitter. *(footnote continues)*

the plain meaning of these terms. All four terms can be used to mean units; the terms "building" and "structure" cannot reasonably defined as anything else.

EPA next argues that the Section 111(a)(3) definition has no application to the nonattainment provisions. EPA Br. at 42. The Agency is wrong. By virtue of the explicit reference in Section 110(a)(2)(D) and (a)(4), the definition has applied to new source review in areas with unhealthy air since 1970.[57]

EPA offers a final argument: that the 1977 conference committee dropped a provision from the Senate bill, Section 302(m), that would have explicitly incorporated the Section 111(a)(3) definition of "stationary source" into Section 302. EPA claims the deletion provides "compelling indications" of congressional intent. EPA Br. at 43-44.

EPA, however, has reported only part of the conference committee's action on the definitional section and hastily drawn an incorrect conclusion. The legislative history of Section 302 bears out our contention that a "major stationary source" is nothing more complicated than a large "stationary source" as defined in Section 111(a)(3).

Section 302(m) was included in the Senate bill to begin with because the bill did not use the term "major stationary source" at all. Rather, the Senate bill used the term "major emitting facility." "Major emitting facility" was defined in

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(footnote continued)

But if the unit itself is a "major" emitter, then netting is limited to that unit alone. If its emissions increase, review is required. The same analysis applies to the addition of a wholly new unit within a plant; the firm avoids review by reducing emissions elsewhere in the plant only so long as the new unit itself is not a "major" emitter.

Recognizing this limitation on the use of the bubble to avoid review allows one to join the court's "source" and "bubble" holdings in a manner that is both internally consistent and consistent with the Clean Air Act. This limitation was respected in EPA's 1980 dual definition; it has been tossed aside now.

[57] The Agency rests its case on the preface to Section 111(a), which states that the definitions given therein are "[f]or the purposes of this section." It does not say "for the purposes of this section *only*."

Section 302(k) as any "stationary source" which emits 100 tons or more per year. S.252, §302(k), 3 *Leg. Hist.* at 1593. "Stationary source" was then defined to have the same meaning as in Section 111(a)(3). *Id.*, §302(m). Thus the function of Section 302(m) was only to clarify that "major emitting facility" meant a building, structure, facility, or installation which emits 100 tons or more per year.[58]

The House bill used the term "major stationary source," which was defined as "any stationary facility or source" which emits 100 tons or more per year. H.R. 6161, §302(o)(1), 4 *Leg. Hist.* at 2905. The House bill and its legislative history are devoid of any indication that this definition meant anything other than its plain reading suggests: a large "building, structure, facility, or installation." In the House bill, there was simply no need for another provision to define "major stationary source."[59]

The conference committee described both the Senate and House provisions in identical terms: "any stationary source" which emits 100 tons per year.[60] The committee then adopted *both* terms. It equated "major emitting facility" and "major stationary source" and defined both as "any facility or source" emitting 100 tons or more per year. Section 302(j), 42 U.S.C. 7602(j). The conference report indicates that the committee intended to adopt the Senate's definitions: The bill "[d]efines

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[58] Any doubt about the Senate bill's intent is dispelled by the legislative history of the permit provisions, which clearly shows that "major emitting facility" term was intended to include to new and modified units built within plants. See page 33, *infra*.

[59] Any doubt about the scope of the term "major stationary source" is dispelled by looking at the 1976 House bill, where the definition originated. The definition first appeared in provisions giving certain sources extensions of compliance deadlines on condition that they pay penalties. The definition explicitly included "a source listed as provided in section 111," *i.e.*, "stationary sources" as defined in 111(a)(3). See H.R. 10498, §121(a)(3) as reported by the House Committee in 1976, 7 *Leg. Hist.* at 6880. See also the legislative history of the House bill's permit provisions, pages 35-36, *infra*.

[60] H.R. Rep. No. 564, 95th Cong., 1st Sess. 172, 3 *Leg. Hist.* at 552.

major stationary source and major emitting facility as defined in the Senate bill."[61]

Thus, far from providing "compelling indications" to support EPA, the legislative history of the "major stationary source" definition reiterates that units within plants are not exempt from permit requirements.

B. Petitioners' Construction Conflicts With the Terms of the Statutory Offset Waiver

The Clean Air Act establishes five conditions which must be satisfied before a "major stationary source" may be constructed or modified in an area with unhealthy air: A complete SIP, net reduction offsets, the lowest achievable emission rate, company-wide compliance, and (in areas with 1987 extensions) a cost-benefit analysis. If built at a new site, a new project that will emit 100 tons or more per year is a "major stationary source" and is subject to the five conditions. But under EPA's construction, if the same project is built within the confines of an existing plant, and if it *partially* complies with the offset condition, then is not a "major stationary source" at all. It may ignore the four other conditions entirely.

EPA's construction produces a result completely opposite that provided by the statute. Even when a SIP contains sufficient room to accomodate new source emissions, the Act allows a state to waive only one of the five conditions: the offset requirement. Section 173(1)(B). See page 12, *supra*. The other permit conditions may not be waived even though the plan assures attainment of the health standards by the deadlines. EPA's 1981 rules, however, retain the offset requirement, the only condition the Act allows to be waived. The rules allow the other four conditions, which are unwaivable under the Act, to go completely by the boards.

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[61] *Id.*

C. The 1977 and 1981 Legislative History Confirms That "Major Stationary Source" Includes Large Units Built Within Plants

1. The 1977 Nonattainment Amendments

The same conclusion follows from the legislative history of the 1977 amendments to the Act. The current permit provisions originated in 1976 legislation to amend the Act. This bill proceeded as far as conference committee agreement, but failed to become law because of a last-minute filibuster on another issue. To tide over until Congress could complete action the following year, EPA then adopted the "Offset Ruling" discussed above. In 1977, Congress amalgamated the 1976 bill and the EPA ruling into the current law. From beginning to end, the permit provisions applied to the major new and modified units built within plants, not just to plants themselves.[62]

(a) The 1976 Bill. The 1976 bill provided only a limited exception from the general growth prohibition of the 1970 Act. It did not allow construction of major emitting facilities at *new* sites under any circumstances. It allowed the addition of "a facility proposed for construction or modification at an existing site or plant," but only if the firm wishing to build the facility demonstrated that the "best available control technology," company-wide compliance, and offset conditions were met. S. 3219, §119, 94th Cong., 2d Sess. (1976), 5 *Leg. Hist.* at 4312.

The bill clearly distinguished between "facilities," on the one hand, and "sites," "plants," and "facility locations," on the other hand. *Id.* Under the terms of the bill there was absolutely no room for use of an exclusively plant-wide "source" definition to evade these requirements.

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[62] Where, as here, legislation was developed in a continuous, integrated effort spanning two Congresses, the legislative history of the prior Congress is a relevant source for insight into the meaning of the final legislation. See Seatrain Shipbuilding Corp. v. Shell Oil Corp., 444 U.S. 572, 596 (1980); FMC v. Seatrain Lines, 411 U.S. 726, 736 (1973).

(b) **The Offset Ruling.** After the 1976 bill failed to pass, EPA issued the Offset Ruling. Patterned after the 1976 legislation, the ruling allowed " 'major' new sources" and " 'major' modifications" to be constructed only upon compliance with the three technology, compliance, and offset conditions. In previous regulations which the Offset Ruling interpreted, a "new source" was defined as a new "facility, building, structure, [or] installation" and a "modification" was a pollution-increasing change in such a source. 41 Fed. Reg. at 55,528, J.A. 21.

Further evidence that the ruling applied to such units is apparent in the ruling's discussion of "internal" and "external" offsets. *Id.* at 55,526, 55,529 J.A. 15, 30. (An "internal" offset is an emission reduction from another source at the same plant; an "external" offset is one from another source at another site.) Internal offsets do not *exist* unless "sources" are units within plants: If "source" meant plant, then internal reductions would be used to avoid the permit process to begin with, and the offset requirement would never come into play.

In addition, the ruling applied to a new source "even though such source may replace an existing source with the result that the net additional emissions are less than [major] amounts." Such a source is subject to the LAER requirement and the other permit conditions. *Id.* at 55,528, (J.A. 22). For two reasons, this passage shows that "source" means units within plants. First, if "source" meant plant, then this project *would* be able to avoid review by keeping "net additional emissions" below major levels. Yet this is expressly prohibited. Second, as EPA itself still recognizes (46 Fed. Reg. 50,767, J.A. 103), whole plants are almost never replaced. It is units within plants that are replaced. Thus the passage makes sense only if it refers to replacement of units within plants.

(c) **The 1977 Amendments.** In 1977, both the Senate and House enacted bills that required major new and modified units to obtain permits.

In the Senate, the Environment and Public Works Committee began its deliberations with a bill whose new source

permit provisions were identical to those of the 1976 conference committee bill. S. 252, §11, 5 *Leg. Hist.* at 3605-06. The committee addressed the following question: "Should the exception [from the growth ban] be available only for expansion at existing sites, or also for the construction of new facilities at new sites?" A Section-by-Section Analysis of S. 252 and S. 253 Clean Air Act Amendments, 5 *Leg. Hist.* at 3873. The committee opted to extend the exception.[63]

The committee maintained the three conditions of the 1976 bill and the Offset Ruling with only one significant change: Like the final legislation, the Senate bill provided that a state may waive the offset requirement if it revises its SIP to accomodate the extra emissions.[64] The committee provision was adopted by the full Senate.

The House Interstate and Foreign Commerce Committee reached the same result by adopting the EPA Offset Ruling directly into the law. H.R. 6161, §117 (adding §127(b)(2)), 4

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[63] To accomplish this, the bill used the term "major emitting facility" alone, dropping the limiting reference to "a facility proposed for construction or modification at an existing site or plant." S. 252, §13 (as reported by the committee), 3 *Leg. Hist.* at 632.

Introducing the bill on the floor, Senator Muskie made clear the limited nature of this change and the meaning of the term "major emitting facility." He said:

> This year the issue that drew the greatest attention during the working sessions of the committee was the issue of new emissions in areas exceeding standards. The provision contained in the bill reported by the Committee last year dealt only with the expansion of existing facilities in such areas.
>
> The committee this year determined that a broadening of that provision was necessary so that new sources, without any existing facilities in the area, could still enter the area and construct new facilities under carefully limited procedures and meeting stringent requirements. The committee adopted a provision which provides protection for air quality while at the same time allowing new sources to be constructed.

3 *Leg. Hist.* at 711. There is absolutely no basis for EPA's suggestion (Br. at 45) that term "facility" had been converted to meaning "plant."

[64] S. 252, §13(g)(3) (as reported by the committee), 3 *Leg. Hist.* at 634-35.

Leg. Hist. at 2331-32. For future application once SIPs were revised, the committee modified the EPA ruling in only one significant respect; like the Senate, it provided for the offset waiver. *Id.*, §127(c)(5)(A), (d)(1), 4 *Leg. Hist.* at 2333, 233637. The committee provision was adopted by the full House. 4 *Leg. Hist.* at 3216.

The conference committee melded the two bills into the current statutory language without any suggestion of a change in the meaning of "source." In post-conference Senate debate, Senator Muskie succinctly stated the universally shared understanding:

> I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]—and to the permit requirements of the revised implementation plans under the conference bill—is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant—or precursor. Thus, a new source is still subject to such requirements as "lowest achievable emission rate" even if it is used as a replacement for an older facility resulting in a net reduction from previous emission levels.

3 *Leg. Hist.* at 355-56.[65]

Against this entire legislative history, the petitioners offer a single passage from the 1977 House report stating that the nonattainment amendments have two main purposes:

> (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow states greater flexibility for the former purpose than EPA's present interpretative regulations afford.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 211, 4 *Leg. Hist.*

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[65] See also the statement of Rep. Paul Rogers, chairman of the House subcommittee responsible for the legislation, when introducing the conference agreement to the full House. 3 *Leg. Hist.* at 319.

at 2678. From this generally-worded passage the petitioners assert that EPA has a broad authority to change the "source" definition—and, by implication, *any* aspect of the nonattainment provisions. EPA Br. at 23, AISI Br. at 23-24, Chev. Br. at 14-15.

The quoted passage says nothing of the kind. It introduces a discussion of the permit provisions which shows that Congress intended precisely the opposite of the petitioners' position. The pages of the House report that follow plainly show that the committee, when referring to "greater flexibility," had in mind just two specific changes in the EPA Offset Ruling.

First, where the EPA Offset Ruling required offsets in every case, Congress provided for the state's option to waive offsets under Section 173(1)(B). This option, in fact, is described under the heading "State Flexibility." *Id.* at 213, 4 *Leg. Hist.* at 2680.

Second, Congress relaxed the Offset Ruling's baseline for calculating the amount of offset credit gained by reducing emissions at an existing source. The Offset Ruling had limited offset credit to reductions below "reasonably available control measure" levels. Congress provided that the offset baseline should be the emission level allowed by the current SIP.[66] This had the effect of allowing more "room" for new emissions.

The 1977 amendments thus increased the states' flexibility in two very concrete ways. Nothing discussed in these pages of legislative history either changes the definition of a "source," or authorizes EPA to change it.[67]

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[66] Pub. L. No. 95-95, §129(a), codified as a note to 42 U.S.C. §7502.

[67] The same is true of petitioners' other, even more general quotations from the legislative history. These passages do no more than recognize (1) the balance between clean air and economic growth struck by the extension of the attainment deadlines, and (2) the great flexibility which the states retain to manage their programs as they see fit within the minimum requirements of the Clean Air Act. None of these passages can be read to support the plant-wide "source" definition.

2. The 1981 Steel Amendments

Congress reiterated the meaning of "source" in the 1981 Steel Industry Compliance Extension Act, described at page 14, *supra*. These amendments were explicitly the product of an agreement between the steel industry, the steelworkers' union, the government, and environmentalists. The amendments allow steel firms to defer certain existing source compliance dates provided they put the money saved thereby into modernizations. To emphasize that these modernizations projects are major new or modified sources subject to the permit requirements, the House report stated explicitly that projects such as the construction or modification of continuous casters, open hearth shops, and basic oxygen furnaces—all discrete units within steel plants—continue to be subject to the lowest achievable emission rate requirement. See pp. 14-15, *supra*. See brief of *Amicus Curiae* United Steelworkers of America.

In the court below, EPA *admitted* that the legislative history of the steel amendment "do[es] indicate that Congress thought new source review would apply to facilities within a plant." Court of Appeals brief for EPA at 19. EPA should not be allowed to gainsay this now.

D. The Statutory Purposes Are Incompatible With The Plant-Wide "Source" Definition

The five conditions on construction or modification of "major stationary sources" each serve a specific congressional purpose. Each of these purposes is violated by allowing nearly all the intended objects of the permit provisions to escape them.

The plainest purpose of the permit provisions is that served by the offset requirement: Making the construction of major new sources a force for reducing pollution rather than increasing it. Observing that plant-wide "source" definition eliminated the requirement for net reductions in pollution, the Court of Appeals found that definition contrary to law. 685 F.2d 718, 720, 726-27 (Chev. App. A-4, A-20). The court followed settled principles for construing a remedial statute which seeks to protect public health from hazards over which

people have no personal control. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980); *United States v. An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 798 (1969); *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).[68]

The other statutory conditions each serve specific congressional purposes as well. The House report states that the lowest achievable emission rate requirement was adopted because "in light of the adverse air quality and health consequences of this new pollution, the committee concluded that all feasible efforts to reduce or control this new pollution should be mandated." The committee concluded that the requirement was also necessary to promote economic growth: "[M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth." In addition, the requirement furthered the objective of improving pollution control technology: "[T]he technology-forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas." See H.R. Rep. No. 294, 95th Cong., 1st Sess. 215, 4 *Leg. Hist.* at 2682.

Congress intended the requirement for company-wide compliance to be a major new incentive for enforcement. Congress had found that a surprising number of existing sources still were out of compliance. For example, in 1975 House hearings, the chief executives of the five major firms in the steel industry admitted that they did not have a *single* plant where all sources were in compliance. See H.R. Rep. No. 294 at 210-11, 4 *Leg. Hist.* at 2677-78. The enforcement resources of the states and EPA had proved inadequate, especially where firms saw financial advantages in delaying compliance. By making compliance at existing sources a

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[68] As this Court stated in *Dotterweich*, 320 U.S. at 280:

> The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument and not merely a collection of English words.

precondition for permission to build new ones, Congress sought to turn the enforcement incentives around.

The purpose of the cost-benefit analysis required of major new and modified sources locating in areas with 1987 extensions is evident on the face of the provision. Congress intended that in areas with the longest delays in meeting health standards, new pollution sources must be subjected to the most exacting scrutiny.

Finally, the principle purpose of the construction moratorium was to give states and industry a common interest in finishing the development and adoption of a complete SIP. As the National Commission on Air Quality concluded, the moratorium has served this purpose effectively with little actual economic disruption.[69]

None of these purposes are served by exempting nearly all major new and modified units from status as "major stationary sources." For these reasons as well as those cited by the Court of Appeals, the plantwide definition contravenes the purposes of the Act.

One last purpose—a purpose Congress surely did not have—requires discussion. The EPA rules significantly distort competition by giving established firms a regulatory edge over newcomers. Consider a situation in which two firms perceive a profitable opportunity to expand in a particular area. The competitors are similarly situated, with but one difference: One firm is new to the area and must build its facility at a new site. The other firm already has a plant there and can

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[69] See page 13, *supra*. The petitioners complain that they cannot build even pollution-reducing replacements where the construction moratorium applies. This, however, is what Congress intended. See the statement of Senator Muskie, quoted at page 36, *supra*. If the petitioners desire a different rule, they must obtain an amendment of the statute from Congress.

Moreover, the "source" definition the petitioner attempt to defend does not limit them to pollution-*reducing* replacement projects. Rather, it explicitly allows contruction of projects which will *increase* plant-wide pollution. Thus if EPA's rules stand, pollution increasing projects will be allowed to go forward even in an area which has completely failed to develop a SIP.

build its new facility within the plant. The newcomer's project is a "major stationary source" and cannot be built unless all five statutory conditions are met. The established firm, however, needs only to secure a partial offset within the plant to avoid its project's being classified a "major stationary source" altogether. If both firms are subject to the same regulatory regime (as the statute requires), they remain similarly situated. Under EPA's rules, however, the even-handed character of the Clean Air Act's requirements is systematically skewed. The petitioners do not suggest any reason to believe Congress intended such a result.

E. There Is No Conflict With *Train* or *Union Electric*

The petitioners argue that a definition of "major stationary source" reaching major-emitting units within plants conflicts with this Court's decisions in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), and *Union Electric Co. v. EPA*, 427 U.S. 246 (1976). These cases, they claim, give a state freedom to choose *any* path to attainment of the health standards that it wishes, regardless of specific minimum requirements of the Clean Air Act. EPA Br. at 36, AISI Br. at 19, Chev. Br. at 16-17.

Train and *Union Electric*, however, do not go so far. *Train* recognizes that in addition to demonstrating timely attainment of the health standards, the states' programs must also "satisf[y] the standards of 110(a)(2)." 421 U.S. at 79. Similarly, *Union Electric* states that EPA must approve a state's plan "if it meets [the] eight specific criteria" set forth in Section 110(a)(2). 427 U.S. at 250. The states have a wide latitute to choose the "mix of emission limitations" (*Train*, 421 U.S. at 79), but this latitude does not include the authority to waive specific requirements of the Act.

By virtue of subparagraph 110(a)(2)(D), since 1970 the minimum requirements of Section 110(a)(2) have included new source review requirements reaching units within plants. As amended in 1977, subparagraph (D) incorporates into Section 110(a)(2) the specific permit requirements of Sections 172(b)(6) and 173. While the states retain control over many particulars of their SIPs under the 1977 amendments, this is

one requirement they may not waive. Because new source review reaching major units within plants is a requirement of Section 110(a)(2), there is no conflict with *Train* or *Union Electric*.

Under this Court's deference cases (including *Train* and *Union Electric*) an agency's construction must be rejected if found inconsistent with the law. We have shown that the plant-wide definition conflicts with the statutory terms, the legislative history, and the congressional purpose. For these reasons, the 1981 rules change must struck down.

II. EPA'S NEW CONSTRUCTION IS A SHARP BREAK WITH THE LONG-STANDING PRIOR RULE, INTERNALLY INCONSISTENT, AND THE PRODUCT OF FAILING TO CONSIDER AN IMPORTANT ASPECT OF THE PROBLEM

The Agency's current interpretation is a flat contradiction of a prior interpretation held for 10 years and twice ratified by Congress. The current interpretation is also internally inconsistent; EPA asserts that the plantwide definition may be used only within a complete SIP, but EPA uses it under the Offset Ruling and the construction moratorium. To the extent that EPA asserts an *empirical* justification for its rules change, the Agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856, 2867 (1983), and failed to support even its partial claims with facts in the rulemaking record. The petitioners therefore fail every test for deference to an Agency's construction.

A. The 1981 Rules Reversed the Long-Standing Prior Interpretation

For areas which do not meet the health standards, EPA's effective rule through 1981 was that "stationary source" includes industrial units of production and operation, regardless whether located at new sites or within pre-existing plants. This was the rule since issuance of the first regulations in 1971. See pages 15-19, *supra*.

Moreover, this was the rule embodied in the 1976 Emission Offset Interpretative Ruling which Congress adopted in the 1977 amendments. The 1976 ruling applied to major new and modified units within plants. The ruling was patterned after the 1976 clean air bill which failed to pass only for other reasons. In turn, the ruling was the basis for the 1977 amendments. See pages 33-36, *supra*.

This Court has frequently held that the reversal of a long-standing administrative construction is a strong sign that deference is not appropriate. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 (1979) (agency's "present position is flatly contradicted by its past actions"). See also *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 93-94 (1973).[70] These principles weigh heavily against the abrupt 1981 reversal.

The Court has also frequently held that great deference is due to an agency interpretation which is contemporaneous with the enactment of the legislation. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961). Deference is particularly in order if the agency plays a role in developing the legislation and if Congress shows that it was aware of and approved of the agency view. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982); *Miller v. Youakim*, 440 U.S. 125, 146 (1979); *Zuber v. Allen*, 396 U.S. 168, 192 (1969).[71] These principles weigh strongly in favor the unit-specific definition which was ratified by Congress in 1976.

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[70] Even if EPA were able to show that its rules did embody the exclusively plant-wide at some time prior to the 1981 change, its present construction could not be rescued. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." FMC v. Seatrain Lines, 411 U.S. 726, 745 (1973).

[71] *Vogel* closely parallels this case. The statutory provision at issue there was adopted some years before at the urging of the Treasury Department. In *Vogel* the Department urged on the Court an interpretation for this provision contrary to the interpretation the Department had expressed to Congress in pressing for its enactment.

B. The Rationale for the 1981 Change Is Internally Inconsistent

The petitioners' principal defense for the plant-wide definition is that a state will have to show that its SIP still guarantees reasonable further progress and timely attainment of the standards. The petitioners, however, do not explain why it is even colorably legal to use the plantwide "source" definition under the Offset Ruling and the construction moratorium. These apply precisely in areas *without* adequate SIPs demonstrating progress and attainment. These are the areas lacking *any* safety net, however imperfect.[72]

C. EPA Failed to Consider Whether the Plant-Wide Definition Increases Pollution in the Aggregate

The petitioners attempt now to revive a factual allegation that EPA conceded in the Court of Appeals: the claim that the prior "source" definition could retard pollution control progress by discouraging modernization projects. This Court should reject the claim, first, because it was conceded below and, second, because EPA failed even to consider an essential element of its claim: the *aggregate* effect of changing the "source" definition.

In its proposal notice, EPA asserted that the prior "source" definition "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." In areas operating under under approved SIPs or the Offset Ruling, EPA claimed that pollution-reducing replacement projects were being delayed. In areas under the construction moratorium (because the states do not have acceptable SIPs), EPA claimed that some such projects were being blocked altogether. 46 Fed. Reg. 16,281, J.A. 93-94.

Challenged by commenters to support these factual claims with evidence, EPA retreated somewhat by the time of

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[72] EPA in fact admits that the plantwide definition allows pollution to *increase* in areas under the construction moratorium (but not, the Agency claims, "significantly"). 46 Fed. Reg. at 50,769, J.A. 109-110.

promulgation. In the final notice EPA continued to claim that there was a "disincentive" for replacement projects, but now asserted only that such replacements might reduce pollution "in some cases." 46 Fed. Reg. 50,768, J.A. 104-05. All EPA cited to support this "some cases" claim was a pair of anecdotal, two-page letters from industry commenters.[73]

It is important to understand what EPA did *not* claim. The Agency did not assert that the plant-wide "source" definition would reduce pollution *overall*; this issue, in fact, EPA did not address at all. EPA claimed only that some unspecified fraction of replacement projects were being delayed by unspecified lengths of time, and that there could be pollution reductions in "*some*" such cases. EPA made no effort to show what percentage of projects covered by the rules change would be replacements (versus expansions). EPA made no effort to determine in what fraction of the replacement cases would pollution be reduced. In short, EPA made no effort to show that the prior "source" definition was counter-productive in the *aggregate*.

Before the Court of Appeals, EPA abandoned even the "some cases" claim. The Agency's brief stated: "EPA did not rely on this [the alleged effect on modernizations] as a basis for its decision." Court of Appeals Br. for EPA at 12. The court nonetheless addressed the issue briefly in a footnote, observing that

> in abandoning its earlier [pre-1981] position, EPA did not cite, nor have we found in the record, any study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality *in the aggregate*. Therefore, EPA's decision to implement the bubble concept, if based on this rationale, would not rise to the level of reasoned decisionmaking for EPA "has some burden . . . to show that a regulation once considered to [effectuate policy] efficiently no longer can be expected to do so." State Farm Mut.

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[73] J.A. 131, C.A. App. 67.

> Auto. Ins. Co. v. Department of Transportation, 680 F.2d 206, 231 (D.C. Cir. 1982). Speculation is not enough.

685 F.2d at 727, n.41 (Chev. Pet. A-18) (emphasis in original).

Since EPA conceded the claim in the court below, this Court should reject the petitioners' attempt to revive it now. Even if the Court decides to consider the claim, however, it should be rejected on the merits. The petitioners cannot produce anything in the record other than unsupported anecdotes to buttress even the limited "some cases" claim. The record is so weak even on this limited claim that the government has felt it necessary to make up a totally speculative, *post hoc* hypothetical. EPA Br. at 30-31.[74] Even this hypothetical fails to address the aggregate consequences of the rules change.

At this point, the petitioners are reduced to vaguely contending that the Court of Appeals applied an improper standard of review. But in *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S.Ct. 2856 (1983), this Court stated:

> Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

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[74] Courts will not consider *post hoc* rationalizations of counsel. Burlington Truck Lines v. United States, 371 U.S. 156 (1962).

The petitioners also make vague allegations about long permitting delays and large cost increases. See EPA Br. at 29, AISI Br. at 25-26. But the facts are otherwise. According to the report of the National Commission on Air Quality, the average time needed to obtain a nonattainment permit was just three to five months, well within the corporate planning horizon for any project large enough to be a "major" source. The Commission also concluded that the permit requirements were unlikely to have any major effect on siting decisions. National Commission on Air Quality, *To Breathe Clean Air* 135, 139-40 (1981). (For background on the Commission, see page 9, n.22, *supra*.)

> implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 2867. The Court of Appeals was certainly correct to hold that the the aggregate impact of the rules change was "an important aspect of the problem" and that EPA's failure to consider it rendered the rules change arbitrary. Indeed, even the limited "some cases" claim is so insubstantially supported that it cannot pass the "counter to the evidence" and "so implausible" tests.

III. THE REPEAL OF THE "RECONSTRUCTION" RULE HAD NO BASIS INDEPENDENT OF THE REDEFINITION OF "SOURCE" AND MUST FALL AS WELL

The Court of Appeals also vacated EPA's repeal of the "reconstruction" rule, holding that the repeal had no basis independent of the change to an exclusively plant-wide "source" definition. The court refused to consider arguments against the rule which were not considered by EPA but which were pressed nonetheless by the industry intervenors. 685 F.2d at 728, n.43 (Chev. Pet. A-20). Petitioner AISI has made these arguments again. AISI Br. at 32-34. They are without merit.

In certain industries (such as the steel industry) old facilities are replaced often by rebuilding them rather than demolishing and replacing them. The reconstruction of a coke oven battery, for example, may be so extensive as to involve replacing everything but the old source's foundation. See page 22, n.52, *supra*.

If a major existing source is demolished and replaced, the replacement is a major new source subject to the permit requirements, even if it reduces pollution. See the statement of Senator Muskie, quoted at page 36, *supra*. The purpose of the "reconstruction" rule is to prevent industries such as the steel industry from perpetually evading the pollution control requirements of the Clean Air Act by reconstructing their sources rather than demolishing and replacing them.

EPA fully considered and rejected AISI's arguments in 1980. 45 Fed. Reg. 52,703 (1980). The Agency repealed the

rule in 1981 only because adoption of the plantwide "source" definition rendered it vestigial. Even as EPA repealed the "reconstruction" rule for nonattainment new source permitting, the Agency *retained* the rule for the purposes of the New Source Performance Standards. 46 Fed. Reg. 50,769, n. 7 (1981), J.A. 110.

The Court of Appeals properly refused to consider AISI's additional arguments on which EPA had not relied. As stated in *SEC v. Chenery Corp.*, a court "may not supply a reasoned basis for the agency's action that the agency itself has not given." 332 U.S. 194, 196 (1947). This Court recently reiterated the *Chenery* principle in *MVMA*, *supra*, 103 S. Ct. at 2867. The Court thus should affirm this portion of the lower court's holding, as well as its vacating of the plant-wide "source" definition.

CONCLUSION

The plant-wide definition of "stationary source" conflicts with the terms, legislative history, and purpose of the Clean Air Act. The redefinition was a sharp reversal of the decade-long congressional and administrative rule. Its legal rationale is internally inconsistent. To the the extent EPA has tried to support its action empirically, the Agency has failed to consider an important aspect of the problem and failed to supply record support for its conclusions. The redefinition of "source" was therefore both contrary to law and arbitrary. The repeal of the "reconstruction" rule had no independent basis and thus must fall too.

For these reasons the decision of the Court of Appeals vacating the rules changes and restoring the prior rules was correct and should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A. INC.,
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
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NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1005

CHEVRON U.S.A. INC.,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

No. 82-1247

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

No. 82-1591

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

**AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
AMERICAN PETROLEUM INSTITUTE, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
GENERAL MOTORS CORPORATION, and
RUBBER MANUFACTURERS ASSOCIATION**

Petitioners, American Iron and Steel Institute, *et al.*, American Petroleum Institute, *et al.*, Chemical Manufacturers Association, General Motors Corporation and the Rubber Manufacturers Association, file this brief in reply to the briefs of respondents Natural Resources Defense Council, *et al.*, ("NRDC") and *amici curiae* United Steelworkers of America and Commonwealth of Pennsylvania, *et al.* Respondents repeatedly attempt to portray the plantwide "source" definition as a threat to attainment of national ambient air quality standards (NAAQS) in nonattainment areas. Such is not the case. In fact, as one commentator has noted, "[t]he bubble is *most needed* in nonattainment areas" in order "to stimulate growth compatible with the Clean Air Act." [1]

Before we address respondents' and *amici*'s concerns in detail, several points should be emphasized. First, use of the plantwide "bubble" *by definition* means that in *no* event can total emissions from a plant increase above *de minimis* levels, and in most instances overall emissions will *decrease* significantly.[2] *"De minimis"* emissions are emissions which are so trivial as to make regulation thereof "pointless expenditures of effort." *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979). As the court there stated, "The ability . . . to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design." *Id.* To the

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[1] Rhinelander, *The Bubble Policy and the Clean Air Act*, 13 Envtl. L. Rep. 10406, 10414 (1983) (hereafter cited as Rhinelander) (emphasis added).

[2] *See, e.g.*, Chevron Br. at 17-19. NRDC repeatedly asserts that existing sources can avoid new source review with "partial" offsets. NRDC's own statistics (NRDC Br. at 5 n.13), however, prove that "partial" offset situations almost never occur. Of the 604 modifications undertaken between 1976 and 1980 by major stationary sources located within nonattainment areas, 590 achieved greater-than-even offsets. That is to say, 97+% of all major plant modifications during that period in fact resulted in emission *decreases*.

extent that NRDC is really attacking EPA's "*de minimis*" emission levels, its challenge is both untimely and unsupportable.

Second, any state which elects to implement a plantwide "source" definition must still demonstrate to the satisfaction of EPA that its Part D State Implementation Plan (SIP), including such definition, will be sufficient to enable the state to make reasonable further progress toward attainment and to achieve attainment as expeditiously as practicable. These requirements apply *regardless* of the "source" definition implemented by the state. Indeed, as noted by EPA (EPA Br. at 3, 39), eighteen of the thirty-one states which had adopted the plantwide "source" definition before it was vacated by the court below successfully demonstrated that the plantwide definition is consistent with these air quality goals.

Third, new production units or pieces of equipment added to an existing plant already are subject to extensive state and federal review and technological control. State operating permits are required in virtually all instances, and many pieces of equipment, particularly larger units such as boilers, furnaces, etc., also must meet federal new source performance standards (Section 111, 42 U.S.C. § 7411; *see* 40 C.F.R. Part 60 (1983)). The implication that large, heavy emitting units will go unreviewed (NRDC Br. at 2) is without basis in fact.[3] A state which elects to impose even more stringent technological controls on new units at existing plants is also completely free to do so. *See, e.g.*, Comments of Ohio EPA, J.A. 138.

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[3] NRDC suggests (NRDC Br. at i, 2) that the plantwide definition allows the construction of "boilers and blast furnaces" within existing plants as if to suggest these kinds of major projects are routinely escaping new source review. To the contrary, projects of this magnitude involve emissions much higher than the 25 to 100 ton per year significance levels complained of by respondents and, in most cases, cannot be netted out of the new source review process.

I. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE CLEAN AIR ACT PRECLUDES EPA FROM ADOPTING A PLANTWIDE "SOURCE" DEFINITION

NRDC's arguments against the plantwide "source" definition depart radically from the conclusions of the court below. The *sole* basis cited by the court for its decision was the so-called "bright line" test, which the court held precluded it from exercising its own judgment in construing the Act. NRDC's brief never even mentions this rationale. Rather, NRDC relies entirely on arguments that the language and legislative history of the Act preclude use of a plantwide "source" definition—arguments which the court below explicitly rejected.

NRDC's statutory language arguments (NRDC Br. at 26-32) can be reduced to two contentions:

1. The Clean Air Act *does* specify a definition of "stationary source" applicable to Part D and that definition can be found in Section 111, 42 U.S.C. § 7411 (the provision requiring that technology-based performance standards be applied to new sources regardless of location); and
2. The four constituent terms ("building, structure, facility, or installation") of the Section 111 "source" definition *require* EPA to impose either a unit-specific or a "dual" definition of "source."

Both assertions are incorrect. The Act does not specify a definition of "source" applicable to Part D. In any event, the Section 111 "source" definition, even if it were found to be relevant for purposes of Part D, does not preclude EPA from adopting, and allowing the states to adopt, a plantwide "source" definition for nonattainment areas.

A. The Section 111(a)(3) Definition of "Stationary Source" Does Not Apply to Part D of the Clean Air Act

Section 111(a), as amended, defines seven terms which are to be used explicitly "[f]or purposes of [that] sec-

tion." As a group, these terms establish the jurisdictional scope of the Section 111 new source performance standard program. Two of these terms, "stationary source" and "new source," delineate those entities for which EPA may promulgate standards of performance and to which such standards may be applied.

Despite the Section 111(a) language limiting these definitions to Section 111, NRDC attempts to engraft them to the rest of the Act, including Part D. NRDC first argues that there is a "presumption" that "a word has the same meaning when used throughout a single statute." NRDC Br. at 28. Such a presumption, however, is "not rigid" and "readily yields," where, as here, it is clearly rebutted by the explicit language and structure of the Clean Air Act. *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

Definitions applicable to the entire Clean Air Act are contained in Section 302, 42 U.S.C. § 7602, of that Act. Definitions applicable only to Part D are set forth in or incorporated by Section 171, 42 U.S.C. § 7501. Neither Section 302 nor Section 171 contains a definition of "stationary source." In the 1977 Amendments to the Act establishing Part D, when Congress intended to apply a Section 111 definition to other parts of the Act, it did so explicitly. *See, e.g.*, Section 171(4), 42 U.S.C. § 7501(4), incorporating the Section 111 definition of "modification" for purposes of Part D, and Section 169(2)(C), 42 U.S.C. § 7479(2)(C), utilizing the same definition for purposes of Part C. That the Section 111 definition of "stationary source" was not similarly incorporated strongly indicates Congress's intent not to apply that definition to Part D.

In *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), a case which presented virtually the identical statutory construction issue raised here by NRDC, the petitioner argued that the definition of a term

in Title I of the Employee Retirement Income Security Act should be applied to that term as used in Title IV of that Act. This Court declined to apply the Title I definition to Title IV because the applicability of the Title I definitions was limited, as here, by the introductory phrase "for purposes of this title." 446 U.S. at 370.[4] This Court further observed that the limited applicability of the Title I definition was "reinforced by the fact that Title I definitions are occasionally expressly incorporated by reference in Title IV" and that this "specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force . . ." *Id.* at 370 n.14.

NRDC also argues that because Sections 110(a)(2)(D) and (a)(4), 42 U.S.C. §§ 7410(a)(2)(D) and (a)(4), refer to "locational review" of new sources subject to Section 111 standards of performance, the Section 111 (a) definition "has applied to new source review in areas with unhealthy air since 1970." NRDC Br. at 30. NRDC misreads these provisions. "Locational review" is simply a component of the Section 111 review process and must be undertaken regardless of whether a new source is to be constructed in an attainment or nonattainment area.[5]

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[4] NRDC would have this Court ignore the Section 111(a) prefatory language "[f]or purposes of this section" because it does not read "for purposes of this section *only*." NRDC Br. at 30 n.57. Such a construction would (a) deprive the Section 111 phrase of its purpose of delineating the proper scope of the Section 111 definitions, and (b) undercut the effect of similar phrases in the Act. *See, e.g.*, the general definition provision, Section 302 ("When used in this Act—") and the Part D definition provision, Section 171 ("For the purpose of this part and section 110(a)(2)(I)—"). Use of the word "only" as suggested by NRDC would hinder Congress's ability selectively to incorporate Section 111 terms elsewhere in the Act, *e.g.*, precluding Section 171(4)'s incorporation of the Section 111(a)(4) definition of "modification."

[5] Section 110(a)(2)(D) provides for state "review (prior to construction or modification) of the location of new sources to which a standard of performance will apply." Section 110(a)(4) provides:

Thus, contrary to NRDC's assertions, "locational review" under Section 111 is not a basis for asserting that the Section 111 definition of "source" applies to anything other than Section 111.

B. Even if It Did Apply to Part D, the Section 111(a)(3) "Source" Definition Does Not Preclude EPA from Adopting a Plantwide Interpretation of that Term for Purposes of Part D

Even if the Section 111(a)(3) definition of "source" did apply for purposes of Part D of the Act, the result sought by NRDC still would not follow. NRDC focuses on the four statutory terms used to define "source"—"building," "structure," "facility," and "installation." NRDC Br. at 27-30. As is readily apparent from common usage of each of these terms, they all can encompass an industrial plant. For example, in common parlance a military "installation" includes all of the component parts of a naval base, not isolated units. Similarly, Webster's Dictionary defines a "facility" as "something (as a hospital) that is built, installed or established to serve a particular purpose." Surely a hospital includes all of its component parts, including separate wings, buildings, equipment, etc.[6]

"The procedure referred to in paragraph (2)(D) for [state] review, prior to construction or modification, of the location of new sources shall . . . provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the *attainment or maintenance* within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard . . ." (emphasis added).

[6] NRDC also concedes that the terms "facility" and "installation" can be construed to refer to entire plants without doing violence to their common sense meaning (NRDC Br. at 29 n.56) but argues that the terms "building" and "structure" cannot reasonably be read to refer to anything other than industrial units of production or operation. NRDC Br. at 27, 30. This argument is inconsistent with NRDC's position that the "dual" definition is valid

The most critical part of the Section 111(a)(3) definition, which NRDC ignores, is the conjunction "or." While the statutory "source" definition is concededly broad, Congress prohibited defining a "source" as a combination of other "sources." Both the *Alabama Power*[7] and *ASARCO*[8] decisions are completely in accord on this point. Yet this is precisely the result that NRDC argues is compelled by Section 111(a)(3)—a "dual" "source" definition that would define a "source" in terms of both the overall plant *and* its component parts. Congress, by using the conjunction "or," rather than the conjunction "and," made clear that no such result was intended or authorized.

C. The Plantwide Definition of "Source" Is Not Prohibited by Section 173

NRDC also argues that a plantwide definition of "source" is prohibited by Section 173 of the Act, 42 U.S.C. § 7503, since under that definition the requirements of Section 173 will not apply to new emission units at an existing plant if there is no increase in plantwide emissions. NRDC Br. at 32. This argument is circular and sheds no light on the question before this Court. Section 173 imposes requirements only on new

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and proper. Under that definition "building" and "structure"—the two terms that NRDC now contends can apply only to individual production units—in fact referred to entire plants. *See* 40 C.F.R. § 51.18(j)(1)(i)-(iii) (1981). Indeed, of the four terms in question, "building" and "structure" are the only two that have *never* been used to refer to anything other than an entire plant. Beyond that, however, NRDC overreaches in asserting that "building" and "structure" cannot be defined as an entire plant. While there are many situations where "plants" are housed within a single "building" or "structure," it is a rare plant in which each of the "industrial units which make up a plant" is segregated into a separate building or structure.

[7] 636 F.2d at 395-96, 402.

[8] ASARCO, Inc. v. EPA, 578 F.2d 319, 323 n.9, 324 and n.17, 326-27 (D.C. Cir. 1978).

sources or modifications to existing *sources*. If an entire plant may be treated as a single source, then Section 173 does not apply to any change within that plant that does not significantly increase plantwide emissions.

The nub of NRDC's argument, however, appears to lie in NRDC's perception that it is unfair or contrary to Congress's intent to treat a given emission unit as a modification when constructed at an existing plant but as a new source if constructed at a new site. NRDC Br. at 2, 4, 32.[9] There is a clear distinction between emission units built at existing plants and those at new sites. An emission unit at a new site invariably results in an increase in emissions. That is often not the case with emission units at existing sites; and if it should be the case, review will be required under the present regulations.

D. The Legislative History Does Not Preclude EPA from Adopting a Plantwide Definition of "Source"

Industry Petitioners will not attempt here to improve upon EPA's analysis of the relevant legislative history.[10] We agree with EPA that the legislative history does not preclude EPA from adopting, or allowing the states to adopt, a plantwide definition of "source" for nonattainment program purposes. We do note that the court be-

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[9] NRDC makes much of this supposed distinction between the construction of a new source at a virgin site versus the construction of that same source within an existing plant. In fact, existing source modifications are regulated more strictly than are completely new sources. No matter whether a plantwide or a "dual" definition of "source" applies, construction at a new site of a new facility emitting up to 99 tons of any air pollutant is not subject to new source review because it is not a "major" source. *See* the Section 302(j), 42 U.S.C. § 7602(j), definition of "major stationary source." Much smaller projects built within existing plants, however, are subject to new source review as "modifications" if the net emission increase exceeds one or more of the significance levels (*e.g.*, 25 tons or more per year for particulate matter).

[10] *See* EPA Br. at 42-48 and EPA's Reply to NRDC's Opp. at 4-7.

low considered NRDC's legislative history arguments,[11] conducted its own survey of that history, and ultimately concluded that the legislative history of the 1977 Amendments to the Act affords no clear resolution of the "source" issue. 685 F.2d at 723, Chev. Pet. App. at A-8. Having so concluded, the court below should have deferred to EPA's reasonable interpretation of that term for purposes of Part D. *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976); *Train v. NRDC*, 421 U.S. 60, 87 (1975).

The *post hoc* legislative history cited by Respondent NRDC (NRDC Br. at 38) and *amicus* United Steelworkers of America relating to the Steel Industry Compliance Extension Act of 1981 [12] does not shed any light upon Congress's intent in 1977 with regard to the scope of "source" for purposes of Part D.[13] It is well settled that *post hoc* legislative statements and determinations are not a reliable indicator of the collective intent of a prior Congress. *Bunker Hill Co. v. EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981). Moreover, Congressional state-

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[11] Restated by NRDC in its Brief at 33-38 and its Opp. at 10-21.

[12] Pub. L. No. 97-23, 95 Stat. 139 (1981), codified as amendments to Section 113 of the Clean Air Act, 42 U.S.C. § 7413.

[13] The Extension Act was passed by Congress in July, 1981, four months after EPA's March, 1981 *Federal Register* proposal to adopt a plantwide definition of "source." If Congress wanted to settle this point in the 1981 Act, it could have done so easily and directly by insertion of a definition of "source" in Part D or Section 302. In fact, as NRDC points out (Opp. at 24 n.50), in May, 1982 the Senate Committee on Environment and Public Works, in S. 3041, adopted an amendment to Section 171 adding a definition of "major stationary source" as "each discrete operation, unit, or other activity which produces or may produce emissions of one hundred tons or more per year" of a pollutant for which the area does not meet ambient air quality standards. S. 3041, § 114 (adding Section 171(5)), reprinted in S. Rep. No. 666, 97th Cong., 2d Sess. 157 (1982). That S. 3041, although not enacted, included such a definition underscores Petitioners' point that Part D in its present form does not specify a definition for "source."

ments narrowly focusing upon amendments to Section 113 (relating to enforcement), 42 U.S.C. § 7413, of Part A of the Clean Air Act for the purpose of granting relief to the economically beleaguered steel industry cannot be applied meaningfully to interpret terms of the Part D programs with their far broader purposes of accommodating growth and air quality improvement in nonattainment areas.

II. EPA'S CONSIDERATION OF THE ISSUES RAISED BY THE PLANTWIDE "SOURCE" DEFINITION WAS ADEQUATE

Contrary to NRDC's assertions at 25-26 of its brief, EPA did *not* fail to consider an important aspect of the problem, *i.e.* whether the plantwide definition of "source" promotes pollution-reducing modernizations or, more accurately, whether the "dual" definition discourages such modernizations. EPA raised this issue and weighed comments on it. *See* 46 *Fed. Reg.* 50767-68 (Oct. 14, 1981), J.A. 104-06. Pertinent responsive comments cited actual situations of the modernization-inhibiting effects of the "dual" definition. No other comments provided evidence to the contrary. In the end, however, EPA based its adoption of the plantwide definition upon two important policy considerations (administrative simplicity and state flexibility) and explicitly disclaimed any reliance on the impact upon modernization of either definition. *Id.*[14]

[14] The court below criticized EPA's failure to produce any "studies" or "surveys" establishing that the "dual" definition would retard air quality improvement in the aggregate. 685 F.2d at 727 n.41, Chev. Pet. App. at A-18 n.41. At no prior time, however, during the August 1980 promulgation of the "dual" definition or otherwise, did EPA cite any such study or survey establishing that the "dual" definition would *aid* air quality in aggregate. Neither the 1980 "dual" definition rulemaking record nor the 1981 plantwide definition rulemaking record contains any studies or surveys on the modernization impact of either definition nor did EPA claim that studies or surveys existed to support either definition. Absent such studies or surveys, EPA properly based its 1981 determination upon

EPA's choice has a rational basis, and, under settled principles, that choice must be upheld whether or not NRDC or the court below agrees that it is the best choice.[15] *Train v. NRDC*, 421 U.S. at 87.

III. THE STATE *AMICUS* BRIEF PROVIDES NO BASIS FOR INVALIDATING THE PLANTWIDE "SOURCE" DEFINITION

The states joining the Pennsylvania *amicus* brief do not, and in the face of clear record evidence to the contrary[16] cannot, contend that a "dual" definition of "source" is essential to enable all states to reach attainment of ambient air quality standards as expeditiously as practicable. Indeed, they do not even contend that that is the case in their *own* states. Rather, they argue that (1) unless all states are forced to adopt a "dual" definition, regardless of whether that definition will benefit air quality, other states such as themselves will be at a "competitive disadvantage" (State Br. at 8), and (2) a man-

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reasonable policy considerations of administrative simplicity and maximum state flexibility. *See* Rhinelander at 10416.

[15] As more fully set forth in the initial briefs (Industry Br. at 23-31, EPA Br. at 23-41), reducing emissions was not the only purpose which underlay Congress's enactment of Part D of the Act. Had it been, Congress simply could have prohibited the operation of any source in any area where national ambient air quality standards are exceeded. Instead, however, Congress carefully crafted a balance between economic vitality and the need to reduce emissions. Even if "studies" or "surveys" were available (*see* n.14 above), therefore, demonstrating that the "dual" definition was superior to the plantwide definition in terms of reducing emissions, that alone would not invalidate EPA's choice of the plantwide definition. The only inflexible command of the Act is that the ambient standards be attained by a given date. It is neither unlawful nor arbitrary for EPA to permit states to use a plantwide definition when and if they can demonstrate that that mandate will be achieved with that definition.

[16] *See* Comments of the Arizona Department of Health Services, J.A. 136-37.

datory "dual" definition gives the states a powerful club for forcing existing plant owners seeking to grow or modernize "voluntarily" to settle with a state, rather than litigate, *other*, unrelated air issues in controversy with that state (State Br. at 10).

We submit that to require a nationwide "dual" definition of "source" on the basis of such considerations would fly in the face of the expressed intent of Congress in enacting Part D—namely to give *all* states "greater flexibility [in allowing reasonable economic growth in nonattainment areas while assuring attainment of ambient air standards] than EPA's [then] present interpretative regulations afford." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 211 (1977).

There is no basis in the Act for penalizing the thirty-one states or jurisdictions that have to date elected to implement a plantwide "source" definition (*see* EPA Br. at 3, 39)—and of which eighteen have already demonstrated to EPA that such implementation is consistent with achievement of the air quality goals of the Act—because a handful of other states elect not to do so. States always have the option of adopting requirements more stringent than the Act requires, but if they elect to do so, they must also accept the consequences—that industry may choose to relocate in areas which permit reasonable growth and modernization consistent with attainment and maintenance of national standards. Indeed, the relocation of industry to areas where there is more opportunity and room for growth and modernization is basically consistent with the goals of both Parts C and D of the Act.

CONCLUSION

For the foregoing reasons, in addition to those stated in our initial brief, the decision below should be reversed.

Respectfully submitted,

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Nos. 82-1005, 82-1247 & 82-1591

In the Supreme Court
OF THE
United States

OCTOBER TERM 1983

CHEVRON U.S.A. INC., a corporation, et al.,
Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
Respondents.

REPLY BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

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REPLY BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

PRELIMINARY STATEMENT

Respondents have failed to come to grips with the arguments raised in the opening brief for petitioner Chevron U.S.A. Inc. Respondents repeatedly concede that the statutory provisions of the Clean Air Act define a stationary source as a "building, structure, facility or installation" (Resps.' Br., pp. 23, 24, 27, 28). But, as discussed in our opening brief, the EPA regulations in question here simply conformed the regulatory definition of stationary source to that statutory definition; EPA defined stationary source as "any building, structure, facility or installation," the precise definition set forth in the Act. The terms "building, structure [or] facility" have been reasonably construed by EPA to mean, essentially, an entire plant under both the 1981 regulations *and the 1980 regulations advocated by*

respondents. Thus, respondents' case rests on the untenable assertion that EPA abused its agency discretion by defining "installation" to mean an entire plant as well.

Moreover, the legislative history of the Clean Air Act does not support respondents' assertions that Congress intended to preclude EPA from adopting the bubble concept. Respondents ignore the finding of the court of appeals that "the legislative history is at best contradictory" (Chev.Pet.Appx., p. A-17, n. 39). With respect to the legislative history of the 1977 amendments to the Act, respondents assert that Congress in 1977 adopted EPA's 1976 Offset Ruling. But the 1976 Emissions Offset Ruling is itself not explicit as to what constitutes a "source." At most, that Ruling suggested that a "source" would be defined as a new "facility, building, structure, installation or operation" (JA 21)—a definition almost identical to that adopted by EPA in the challenged 1981 regulations in question.

Respondents attempt to confuse the matter by asserting that EPA, in adopting a plantwide definition of "stationary source" in nonattainment areas, reversed a "long-standing" rule which allegedly had been in effect since 1971. To put it succinctly, this argument is absurd. The Part D provisions of the Clean Air Act which deal with nonattainment areas were not even in existence in 1971. Congress passed those provisions as part of the Clean Air Act Amendments of 1977, and EPA made no attempt to define "source" under Part D until 1979.

At the very least, Congress has left to EPA the task of defining "stationary source" under the nonattainment pro-

visions of the Clean Air Act. Neither the court of appeals nor this Court may substitute its judgment for that of EPA on this basic policy issue.

I. THE EPA REGULATIONS IN QUESTION SIMPLY CONFORM THE REGULATORY DEFINITION OF "STATIONARY SOURCE" TO THE DEFINITION SET FORTH IN THE CLEAN AIR ACT.

Respondents have made no attempt to address the fact that the EPA regulations in question simply conform the regulatory definition of "stationary source" to the definition in the Clean Air Act. Instead, respondents concede that the Clean Air Act defines a stationary source as a "building, structure, facility or installation"—the precise definition adopted by EPA in the challenged regulations (Chev.Br., pp. 12-13). It is significant that respondents do not identify any principle of law which would preclude an agency from conforming its regulations to the controlling statutory language. EPA acted rationally, reasonably, and well within both the terms of the Act and its agency discretion in promulgating the 1981 regulation.

Respondents attempt, as they did in the court of appeals, to confuse the matter by asserting that "stationary source" must be defined so as to include units within each plant, such as individual boilers or blast furnaces (Resps.' Br., p. 26). But nothing in the Clean Air Act requires that a "stationary source" be defined so as to require permits for each individual piece of equipment in a plant.[1] EPA acted well within

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[1]Respondents rely upon the court of appeals prior decision in *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir. 1978) 578 F.2d 319 in asserting that "stationary source" has been defined in section 111 of the Act to "denote discrete industrial units of production and operation" (Resps.' Br., p. 8). As discussed in our prior briefs (Chev.Br., pp. 11-12, n. 7; Chev.Pet., pp. 8-10), the *ASARCO*

its discretion in 1981 when it repealed its prior regulations which had defined "installation"—one of the terms in the stationary source definition—to include all identifiable pieces of process equipment (Chev.Br., p. 13)

With respect to the remaining terms in the stationary source definition—"building, structure [or] facility"—there can be little doubt that these terms can reasonably be defined to encompass an entire plant. Even the 1980 regulations, which respondents now embrace as the correct definition (Resps.' Br., p. 15), defined "building, structure, or facility" to "mean, essentially, an entire plant" (Chev. Pet. Appx., p. A-9; 45 Fed.Reg. 52746 (Aug. 7, 1980); J.A.

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decision has been widely criticized and cannot support the result in the instant case (Landau, *Alabama Power Co.* v. *Costle:* An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Envtl.L. 585, 626; see An Overview of the Bubble Concept (1982) 8 Colum.J.Envtl.L. 137, 151; Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat.Resources L. 177, 215). Moreover, the *ASARCO* decision was expressly limited to the New Source Performance Standards in section 111; as the court of appeals decision in *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 demonstrates, the *ASARCO* decision cannot be read to prohibit use of the plantwide definition in contexts outside of section 111 (Chev.Br., p. 11; Chev.Pet., pp. 8-10). The state implementation plan provision, section 110, involved in this case is a separate regulatory system which is distinct from section 111: While section 111 is oriented only towards developing technology standards on an industry-by-industry, equipment-by-equipment-type basis, section 110 is oriented towards meeting air quality standards in nonattainment areas (see EPA Br., pp. 4, 7). In light of section 110's primary goal of assuring reasonable further air quality progress in nonattainment areas, the arguments in favor of a plantwide definition for section 110 are particularly compelling. The plantwide definition is consistent with section 110's purpose of improving overall air quality rather than section 111's much narrower focus on the technology of particular equipment or industries.

88). Respondents' bare assertion that "the terms 'building' and 'structure' cannot [be] reasonably defined as anything else besides individual industrial units" (Resps.' Br., p. 30) is thus inconsistent with the 1980 dual definition which respondents proclaim properly "maintained the historical scope of the [new source] review provisions" (Resps.' Br., p. 15). The fact of the matter is that "building, structure [or] facility" can be, and has been, reasonably construed on a plantwide basis.

Respondents' numerous references to the five conditions for construction of *major* stationary sources (Resps.' Br., pp. 2-4, 23-25, 32) are irrelevant; respondents do not even attempt to refute our demonstration that a project which results in a de minimis increase in plantwide emissions (or often a net decrease in plantwide emissions) is simply not a major stationary source within the meaning of the nonattainment provisions of the Clean Air Act. As discussed in our opening brief, there are compelling reasons for allowing a project to proceed in a nonattainment area if the net emissions increase from the plant as a whole is below the minimal threshold levels allowed by statute (Chev.Br., pp. 18-20).

Implicit in respondents' argument on this point is the notion that an individual piece of equipment in a plant modification or expansion which will emit 100 tons of pollution per year must be subject to the same conditions as a similar piece of equipment in a new plant construction, *even if the plant modification or expansion as a whole would result in net decreases in emissions.* But it is clear that the impact of the two projects upon air quality is totally different—new plant construction *increases* emissions in the nonattainment area, while a project to expand or modify a plant may

allow replacement of old, poorly controlled facilities and *reduce* emissions in the area. Respondents fail to explain how a construction moratorium on projects which will result in reduced emissions in nonattainment areas is consistent with the terms or goals of the Clean Air Act.

II. THE EPA REGULATIONS IN QUESTION ARE IN ACCORD WITH THE LEGISLATIVE HISTORY AND PURPOSES OF THE CLEAN AIR ACT.

In arguing that the legislative history of the Clean Air Act precludes a plantwide definition of "stationary source," respondents ignore the finding of the court of appeals that "the legislative history is at best contradictory" (Chev.Pet. Appx., p. A-17, n. 39). Hence, according to respondents, it is irrelevant that the court of appeals found that "Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs" (Chev. Pet.Appx., p. A-17, n. 39).

There is no merit to the several fragments of legislative history advanced by respondents in this regard. We discuss each briefly:

1. Contrary to respondents' assertion (Resps.' Br., p. 33), the 1976 Senate bill did not address the issue of whether "source" should be given a plantwide definition or a dual definition. The specific phrase relied upon by respondents—"a facility proposed for construction or modification at an existing site or plant"—was abandoned in the 1977 conference bill which led to the 1977 Amendments (EPA Br., pp. 44-46).

2. There is likewise no basis for the suggestion (Resps.' Br., p. 34) that the 1976 Offset Ruling precluded a plantwide

definition of source. That ruling indicated that a source would be defined as a "structure, building, facility, installation or operation" (JA 21), but did not discuss whether those terms would, in turn, be defined to include only plants or to include individual pieces of equipment as well. In any event, there is no evidence that Congress intended merely to codify the 1976 Offset Ruling when it adopted the 1977 Amendments.

3. Again, respondents' citations to the 1977 legislative history of the Amendments do not support their assertion (Resps.' Br., pp. 34-35) that the nonattainment provisions must be applied to units or pieces of equipment within plants. As discussed in EPA's opening brief, it is the House version of the nonattainment program which was adopted by the 1977 conference (EPA Br., p. 46); yet respondents rely almost entirely upon the legislative history in the Senate. Respondents' cryptic references to the House bill simply do not address the plantwide definition (see Resps.' Br., pp. 35-36).

4. The extremes to which respondents (and the United Steelworkers amicus) go in an attempt to bolster their claims of favorable legislative history are perhaps best illustrated by their reliance upon the legislative history of the 1981 Steel Amendments (Resps.' Br., pp. 14-15). In fact, there is no legislative history in those amendments which addresses the definition of "stationary source," the bubble concept, or any other issues relevant to this case. The passage quoted by respondents (Resps.' Br., p. 15) is taken completely out of context; the full paragraph in the legislative history states:

> *"The Committee proposal is intended to encourage additional capital investments in steelmaking operations.* It is anticipated that the industry will use this opportunity to modernize the American steel industry by building modern continuous casters, converting existing open hearth shops to basic oxygen furnace operations or undertaking similar projects to improve the competitive posture of the industry. *Additional capital investments under the Committee proposal are those investments that would not be made during the same time period if extensions of time for compliance were not granted.* The deferred pollution control funds are not to be diverted to routine capital investment needed to maintain existing productive capacity at a steel mill. For example, the Committee does not envision that a routine blast furnace reline, coke oven end-flue rebuild or other similar projects would qualify as 'additional capital investments in iron- and steel-production operations'" (H.R.Rep. No. 121, 97th Cong., 1st Sess. 12 (1981), reprinted in [1981] U.S. Cong.& Admin.News 63; emphasis added).

In view of the fact that the steel industry must build and modernize casters, open hearth shops, and furnaces, it is not surprising that the House Report used those terms in describing the capital investments encouraged by the Amendments. But nothing in either the quoted passage or any other part of the 1981 legislative history suggests that each caster, each open hearth shop, or each furnace must be deemed a separate "stationary source." Respondent's assertion that the legislative history describes casters, furnaces or shops as "examples of the type of projects that would be subject to LAER and the other new source permitting requirements" (Resps.' Br., p. 15) is thus refuted by the legislative history relied upon by respondents and quoted in full above.

Respondents' briefs make a pro forma attempt to argue that the nonattainment provisions of the Act do not have the two main purposes of allowing reasonable economic growth and allowing states greater flexibility. The greater part of their briefs, however, disregard Congress' clear and unambiguous statement of purposes and assume that flexibility and economic growth are irrelevant.

Thus, for example, respondents do not dispute the fact that plantwide definition and the bubble concept will afford the states flexibility (see Chev.Br., pp. 15-17). In fact, Pennsylvania and the other state amici assert that the plantwide definition should be barred *because the plantwide definition would allow the states greater flexibility:* The state amici arguing that allowing states to incorporate the plantwide definition in their attainment plans will somehow create "interstate pressures to weaken emission standards" (Penn.Amici Br., p. 7). The state amici's assertions are wide of the mark: As discussed in our opening brief, each state must demonstrate to EPA that its overall air quality plan assures reasonable further progress toward meeting air quality standards (Chev.Br., p. 17). Thus, allowing states the option of including the plantwide definition in their air quality plans could not possibly create competition among states to weaken emission standards. The only interstate competition, if any, would be to encourage states to develop cost-effective, efficient air quality plans which are appropriate to the conditions of the particular state. That is the very sort of competition which Congress envisioned in setting forth the purpose of allowing states greater flexibility.

Respondents have also made no attempt to dispute the fact that the plantwide definition will allow reasonable

economic growth to continue in nonattainment areas while reasonable further progress is made to attain air quality standards (see Chev.Br., pp. 17-19). Instead, respondents assert that use of the plantwide definition will "skew" economic growth in favor of established firms in an area (Resps.' Br., pp. 40-41; see also Penn.Amici Br., pp. 11-13). Hence, respondents argue that the plantwide definition discriminates against a newcomer who wishes to build a particular facility at a new site, and favors an established firm who wishes to build a similar facility at an existing plant. Respondents' assumption that the two firms are "similarly situated" (Resps.' Br., p. 41) simply strains credulity. A newcomer who wishes to build a new facility which will emit 100 tons per year of a particular pollutant is by no means similarly situated as an established firm who wishes to replace an old facility currently emitting 200 tons per year with a new facility which will emit 100 tons per year. The established firm's modernization project will result in a 100 ton per year net *reduction* in emissions; the newcomer's project would result in a 100 ton per year net *increase* in emissions. Respondents fail to come to grips with the facts that the plantwide definition encourages modernization and expansion of industrial plants, in accord with the legislative history and purposes of the Clean Air Act.

III. EPA ACTED REASONABLY IN PROMULGATING REGULATIONS USING THE BUBBLE CONCEPT IN NONATTAINMENT AREAS.

Throughout these proceedings, respondents have ignored the limited scope of judicial review of an agency's administrative action. Notably, respondents do not even attempt to respond to the principle in *Train v. Natural Resources Def. Council* (1975) 421 U.S. 60, that where an adminis-

trative agency adopts regulations implementing a "sufficiently reasonable" construction of a statute, a court of appeals is precluded "from substituting its judgment for that of the Agency" (421 U.S. 87).

The court of appeals did not, and could not, find EPA's regulations to be unreasonable. This is not a case where an agency adopted an unreasonable construction of a statute. Consistent with the provisions of the Clean Air Act, EPA adopted a plantwide definition of "stationary source" to allow states greater flexibility in developing nonattainment programs and to reduce regulatory complexity (Chev.Br., p. 11). Nevertheless, the court of appeals substituted its judgment for that of EPA and Congress, relying solely on its own policy judgment that the bubble concept would cause unacceptable harm to air quality. But it is for Congress to define the de minimis emissions increases which are acceptable and consonant with achievement of attainment in nonattainment areas, and it is for EPA to fashion regulations to meet those levels.

There is also no merit to respondents' assertion that EPA's 1981 plantwide definition "is a sharp break with the long-standing prior rule" (Resps.' Br., p. 42). Respondents' assertion that since 1971 EPA's new source review applied to individual units within plants (Resps.' Br., pp. 15-19, 42-43) is simply wrong:

1. The Part D provisions of the Clean Air Act which deal with nonattainment areas were not even in existence until Congress passed the Clean Air Act Amendments of 1977.

2. Respondents concede that the 1971 EPA regulations contain no definition of "stationary source" (Resps.' Br.,

p. 15). The 1973 EPA regulations used the terms "facility, building, structure, [or] installation" (Resps.' Br., p. 16) — the same terms used in the 1981 regulations challenged by respondents.

3. Similarly, the 1976 Offset Ruling relied upon by respondents defined a "source" as a "facility, building, structure, installation or operation" (JA 21). Nothing in the 1976 Offset Ruling suggests that this definition was intended to apply to individual units or pieces of equipment within a given plant.

4. EPA made no attempt to define "source" under the Part D nonattainment provisions until 1979. The history of EPA's 1979 proposal to allow states with approved state plans to use a plantwide definition of source is set forth in EPA's opening brief (EPA Br., pp. 9-11).

Moreover, nothing in the record supports respondents' assertion that EPA "fail[ed] to consider an important aspect of the problem" (Resps.' Br., p. 42). Respondents argue that EPA failed to consider whether the plantwide definition would increase pollution in the aggregate and, in particular, failed to provide empirical evidence that the plantwide definition would reduce pollution (Resps.' Br., pp. 25-26, 44-47). The rule of law thus urged would require an agency to produce empirical evidence showing the superiority of its proposed rule (the plantwide definition) over the prior rule (the dual definition). Such a standard would be contrary to both common sense and established legal principles. In *Motor Vehicle Mfrs. Ass'n.* v. *State Farm Mut.* (1983) 103 S.Ct. 2856, for example, this Court held that "[t]he agency must explain *the evidence which is available,* and must offer a 'rational connection between

the facts found and the choice made' " (103 S.Ct. 2871; emphasis added). There is no requirement that exhaustive empirical data be developed to support the proposed rule, especially where, as here, no empirical evidence was ever offered to support the prior rule.

Rescission or modification of a prior rule is subject to the same "arbitrary and capricious" test as is applied to adoption of new rules (103 S.Ct. 2865). Because "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances," all that is required is a "reasoned analysis" (103 S.Ct. 2874). This Court will uphold even "a decision of less than ideal clarity if the agency's path may reasonably be discerned" (103 S.Ct. 2867). Here there can be no doubt as to EPA's reasoned analysis: EPA reasonably decided to conform the regulatory definition of "stationary" source to the definition in the Clean Air Act in order to allow states greater flexibility and to reduce regulatory complexity. The basis for this decision was carefully articulated by EPA and should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

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REPLY BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

The issue posed by this case is whether the 1977 Amendments to the Clean Air Act—which created the New Source Review (NSR) program for nonattainment areas—impose a statutory prohibition precluding the Administrator of EPA from adopting a regulation that allows—but does not require—a state to adopt a plant-wide ("bubble") definition of the term "source" for purposes of new source review. In order to prevail, respondents must establish that Congress, in the 1977 Amendments, itself decided to require new source review whenever new equipment is added or existing equipment is modified at a plant even though resulting increased emissions are offset by corresponding (or even greater) reductions elsewhere in the plant, and even though EPA has found that the State Implementation Plan (SIP) is consistent with the Act and contains adequate assurance of progress toward attainment of national air quality

standards.[1] Respondents must further establish that Congress foreclosed the "bubble" approach in a statute one of whose *"main purposes,"* according to Congress itself, was "to allow reasonable economic growth to continue" during the attainment process (see H.R. Rep. 95-294, 95th Cong., 1st Sess. 211 (1977) (emphasis added), *reprinted in* 4 Staff of Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 2678 (Comm. Print 1978) [hereinafter *Leg. Hist.*])—notwithstanding the wide consensus that the "bubble" approach represents an innovative and creative method precisely for accommodating the goals of efficient growth and environmental protection.[2] And, finally, they must show that the Act denies the Administrator discretion to give the states any flexibility whatever in how to define "source" for purposes of the NSR program, even though Congress stated that the second of the two *"main purposes"* of the nonattainment provisions of the 1977 Amendments was "to allow States greater flexibility" in achieving reasonable economic growth while making reasonable further progress to assure attainment (*ibid.* (emphasis added)).

The history of this case consists of a series of attempts to invent new justifications for the foregoing,

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[1] There is no basis whatever for respondents' assertion (Br. 4, 37, 41, 42) that EPA is seeking to dispense with or waive the statutory requirements prescribed by Congress. The issue in this case is the definition of the "source" that is subject to those requirements; it does not avoid or waive the statutory standards not to apply new source review to an industrial unit that is not a "source." As is common fare for administrative action, EPA has done no more here than define a term for which no legislative definition is provided (see Gov't Br. 40-41).

[2] In addition to the authorities cited in our opening brief, see also Rhinelander, *The Proper Place for the Bubble Concept Under the Clean Air Act*, 13 Envtl. L. Rep. 10406 (1983); Comment, *The Bubble Concept—A Feasible Emissions Reduction Alternative?*, 9 Dayton L. Rev. 65 (1983).

implausible, propositions. Respondents' brief in this Court is no exception. Respondents have dramatically abandoned any defense of the artificial "bright-line" test adopted by the court of appeals—a test which led that court to the extraordinary conclusion that the term "source" is to be given a fixed judicial definition notwithstanding the court's own conclusion that the text and legislative history of the Act provide no such definition. Instead, respondents renew the contention that the plantwide definition is "prohibited" by the Act itself because Congress "specifically intended" new source review to apply to every individual piece of equipment (Br. 6).[3] The principal vehicle advanced to buttress this contention is that the definition of "source" provided by Congress in Section 111 of the Clean Air Act—a definition applicable by its terms only to the NSPS (new source performance standards) program (42 U.S.C. 1857c-6(a)(3) and 7411(a)(3))[4]—in fact applies to the NSR (new source review) program as well.

However, the argument that the Section 111 NSPS definition "applies" to new source review receives an entirely new twist in respondents' merits brief. Respondents purport at the eleventh hour to have discovered that the new source review program created by Congress in 1977 is not a new program at all. It is now asserted to be simply the continuation of an *old* "new source review" program, instituted by Congress in the 1970 Act, and contained in Sections 110(a)(2)(D) and (4) of the Act, 42 U.S.C. 1857c-5(a)(2)(D) and (4) (App., *infra*, 1a-2a). Respondents argue that those sections have always required (what respondents characterize as) "new source review." And, since these sections contain an ex-

[3] "Br." refers to respondents' brief in this Court.

[4] As in our opening brief (see Gov't Br. 4 n.4), statutory citations include both the original and recodified versions of the Act. References to the current version of the Act are to "Supp. V" of the 1976 edition of the United States Code; the designation "Supp. V" will be omitted from such citations.

plicit cross-reference to the Section 111 NSPS definition, the suggested conclusion is that, ever since 1970, the NSR program has applied to sources as defined in Section 111. It follows, respondents say, that in perpetuating the new source review program in 1977, Congress obviously assumed that the program would continue to apply to all individual pieces of process equipment.

In fact this argument is a concoction presenting an entirely distorted picture of the architecture of the Clean Air Act. The program created by Congress in 1970 in Sections 110(a)(2)(D) and (4)—usually called locational review—has nothing to do with the new source review program first created in 1977 in order to deal with the problem of nonattainment. The cross-reference to the Section 111 NSPS definition contained in those sections[5] thus does not in any way suggest that the Section 111 definition was to apply to the nonattainment program created in 1977.

The 1970 Clean Air Act did not contemplate nonattainment at all. It envisioned that all areas of the country would attain National Ambient Air Quality Standards (NAAQS) by the statutory deadline of 1975. To achieve this, the 1970 Act relied primarily on two programs. First, emissions from existing sources were to be reduced, in accordance with the state implementation plan, to meet NAAQS (see Gov't Br. 4). Second, new "sources" were subject to new source performance standards to be promulgated by EPA pursuant to Section 111, 42 U.S.C. 1857c-6.

In connection with the process of attaining and maintaining NAAQS, new "sources" were required to undergo a locational review process (to be specified in the SIP)

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[5] In fact, the locational review sections do not simply incorporate the NSPS definition of "source" or apply to all "sources" within the NSPS definition. They require locational review for those sources for which an NSPS standard has in fact been promulgated by the Administrator. With respect to the NSPS process, see 42 U.S.C. 1857c-6(b) and 7411(b); page 20, *infra*.

pursuant to Sections 110(a)(2)(D) and (4). This was to be a "procedure" for "review (prior to construction or modification)" of the "location of new sources" so as to "prevent the construction or modification of any new source" that the state determines "will prevent the attainment or maintenance" of NAAQS. See 42 U.S.C. 1857c-5(a)(2)(D) and (4). The "procedure" was to cover all new sources to which a "standard" under the NSPS Section 111 program "will apply."

The purpose of locational review was to create a review process—applicable in "clean" and "dirty" air areas alike—to make sure that the installation of new plant and equipment would not prejudice either the attainment or the continuing maintenance of national air quality standards.[6] It looked to the *net* effect on air quality of a new or modified "source." For this reason, its reference to the NSPS definition of "source" has no independent functional significance. The only substantive question in connection with locational review is whether construction or modification of a new "source"—however defined—should be prevented because it will adversely affect net air quality. "Netting" is implicit in the only substantive judgment called for in locational review: whether the addition or modification should be vetoed because it will lead to air quality that does not satisfy NAAQS. If the addition or modification produces no net increase in emissions, locational review has, by hypothesis, no bite. In contrast, the whole point of respondents' submission about NSR is to impose elaborate requirements (*e.g.*, LAER technology, see Gov't Br. 7) on individual pieces of machinery even if there is no net effect on air quality. Importing the NSPS definition into the 1977 NSR pro-

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[6] In practice locational review did not turn out to be a program of great significance; "[f]or the first 4 years after the 1970 amendments, States and EPA conducted rather spotty review of new sources in dirty air areas." 123 Cong. Rec. 18017 (1977) (remarks of Senator Muskie), 3 *Leg. Hist.* 713.

gram would thus have a radically different substantive result than is created by the cross-reference to that definition in the 1970 locational review provisions.

Beyond this, the fact is that the 1977 Amendments marked a major change in the over-all architecture of the Clean Air Act. In contrast to the 1970 Act, which had assumed that air quality standards would be timely attained, the 1977 Act was established in response to the failure of a number of regions to attain air quality standards by 1975. A major concern was that existing law might completely prohibit the construction or modification of facilities in such areas.[7] Following EPA's promulgation of an administrative solution to this problem in its "Emissions Offset Ruling" (41 Fed. Reg. 55524 (1976)), Congress passed the NSR program specifically to deal with the issue of accommodating industrial growth to the problem of nonattainment. The NSR statute was intended to be a "comprehensive scheme."[8] It was designed "to reconcile the[] conflicting concerns" between air quality attainment and continued economic growth.[9] Congress made clear that it was adopting new legislation to address new problems not foreseen in 1970. There exists no support for the novel assertion that the elaborate NSR provisions considered at length in 1977 are nothing more than an extension of the locational review requirements. Indeed, NSR and locational review both continue to exist in the current version of the Act (see 42 U.S.C. 7410(a)(2)(D) and (4)); such coexistence would hardly be expected if NSR were simply the current version of locational review.

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[7] See Gov't Br. 4-5; H.R. Conf. Rep. 95-564, 95th Cong., 1st Sess. 155-158 (1977), 3 *Leg. Hist.* 535-538; S. Rep. 95-127, 95th Cong., 1st Sess. 55 (1977), 3 *Leg. Hist.* 1429; H.R. Rep. 95-294, 95th Cong., 1st Sess. 207-211 (1977), 4 *Leg. Hist.* 2674-2678.

[8] S. Rep. 95-127, *supra*, at 55, 3 *Leg. Hist.* 1429.

[9] H.R. Rep. 95-294, *supra*, at 210, 4 *Leg. Hist.* 2677.

At the same time Congress passed the nonattainment provisions in Part D of the 1977 Amendments, it also adopted Part C. This dealt with a converse problem: preventing the significant deterioration of air quality in areas where the air was cleaner than required by federal standards. This program—called the "Prevention of Significant Deterioration" (PSD) program—was considered by Congress together with the NSR program in 1977. See, *e.g.*, H.R. Conf. Rep. 95-564, *supra*, at 128, 3 *Leg. Hist.* 508. The test for what is to be considered "major" in connection with the NSR term "major stationary source" and the PSD term "major emitting facility" is provided in the same section of the Act (42 U.S.C. 7602(j)). And, as noted in our opening brief (at 11 n.19), it is not unusual for a given plant to be subject to NSR review for one pollutant and PSD review for another. All these considerations suggest that "source" should have the same meaning in both the NSR and PSD programs. And it has of course been held that the plant-wide definition of "source" is the proper one for purposes of the PSD program. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979).

In sum, the assertion that the Section 111 definition of "source" applies to the 1977 NSR program because that program simply continues the requirements of the 1970 locational review sections—which do refer to the Section 111 definition—is a last-minute invention that ignores the Act's history and twists it into an unrecognizable shape.

II.

Respondents' remaining arguments concerning the applicability of the Section 111 NSPS definition to the 1977 NSR program were generally anticipated in our principal brief and can be dealt with summarily. As pointed out in that brief (at 42-43), Section 111 explicitly provides that its definition is "[f]or purposes of *this section*" (emphasis added). Respondents object that

the specification does not provide that it is "'for the [*sic*] purposes of this section *only*'" (Br. 30 n.57). But why should Congress, in enacting the NSPS definition in 1970, add the (redundant) word "only" to exclude the possibility of its applying to the NSR program not created until 1977?[10] In fact, Congress took affirmative steps to avoid tying the new source review program to the NSPS definition of "source": as discussed in our opening brief (at 43-44), it deleted from the 1977 Act a provision expressly adopting the NSPS definition for the NSR program, while at the same time incorporating by reference other NSPS terms.

Finally, the NSR and NSPS programs are entirely different in function and structure (see Gov't Br. 13 n.24, 42-43 n.55). There is therefore no substantive reason to import the NSPS definition into the NSR program.

III.

Respondents' further argument is that the legislative history of the 1977 Act shows that Congress intended the NSR program to apply to every individual piece of process equipment. Respondents misconceive that history. In fact, the tangled legislative history, compiled during the course of two different Congresses, does not directly address—let alone resolve—the question presented here.

Respondents' interpretation of the legislative history hinges on the Senate version of a 1976 bill that proceeded through the Conference Committee but was not enacted into law because of a filibuster. The 1976 Senate bill explicitly incorporated the NSPS definition of "source"

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[10] Both in the original enactment and in subsequent amendments, when Congress intended to apply the NSPS definition to other programs, it said so and made such modifications as were appropriate. See 42 U.S.C. 1857c-7(a)(3) and 7412(a)(3); Energy Supply and Environmental Coordination Act of 1974, 42 U.S.C. 1857c-10, repealed, Pub. L. No. 95-95, § 112(b)(1), 91 Stat. 709, 3 *Leg. Hist.* 215.

for purposes of the NSR program;[11] in addition, as respondents emphasize (Br. 10, 33), its NSR section referred to "a facility proposed for construction or modification at an existing site or plant,"[12] thereby suggesting a difference between "facilities," on the one hand, and "sites" and "plants," on the other. As previously discussed (Gov't Br. 45-46 & nn.58, 60), however, both of these provisions were deleted from the 1977 NSR statute enacted by Congress.[13]

Respondents' contention is that, nevertheless, the Senate assumed that the NSPS definition would apply to NSR and that this assumption persisted throughout the consideration and ultimate enactment of the NSR provisions. Not a shred of evidence supports this argument. Indeed, it ignores the critical fact that the NSR program eventually enacted was based principally on the House rather than the Senate bill.[14] The Conference Report plainly states:

> All implementation plan revisions must contain a permit program for new or modified major facilities similar to the program required in the House bill.

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[11] S. 3219, 94th Cong., 2d Sess. § 302(m), at 79 (1976), 6 *Leg. Hist.* 4688, 4918.

[12] S. 3219, *supra*, § 113(g)(1), at 43, 6 *Leg. Hist.* 4652, 4869.

[13] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended" (*Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 7), and "[i]t is surely not for [the Court] to add to the statute what Congress * * * decided to omit" (*Secretary of Interior* v. *California*, No. 82-1326 (Jan. 11, 1984), slip op. 21).

[14] It also ignores the fact, noted in our reply brief at the petition stage (at 5 n.6), that the 1977 Senate bill, although introduced in the same form as the 1976 bill, was itself significantly amended in the Senate committee and followed the NSR provisions of the 1976 bill only for an interim period until July 1, 1979. See S. 252, 95th Cong., 1st Sess. §§ 110(a)(3)(A) and 113(g)(1), at 58-60, 61-62 (1977), 3 *Leg. Hist.* 632-634 and 635-636, 1520 and 1540.

H.R. Conf. Rep. 95-564, 95th Cong., 1st Sess. 157 (1977), 3 *Leg. Hist.* 537.[15] Most significantly, neither the House bill nor the NSR statute incorporated the NSPS definition of "source" or referred to a "facility * * * at an existing site or plant" as the entity subject to new source review; both applied new source review to a "new or modified major stationary source" and left the term "source" undefined.

Respondents argue—in a confusing paragraph—that the 1977 House bill did not need to adopt the Section 111 definition of "source" because the "plain reading" of "source" *is* the Section 111 definition (" 'building, structure, facility, or installation' ") (Br. 31).[16] But this is nothing more than *ipse dixit*. The question is whether the

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[15] In fact an examination of the House bill will show that its permit program was largely the same as the one ultimately adopted. See Gov't Br. 5-7, and H.R. 6161, 95th Cong., 1st Sess. § 127, at 347-353 (1977), 4 *Leg. Hist.* 2332-2338, 2854-2857.

[16] The confusion is caused, in part, by the use of the word "another" in the sentence: "In the House bill, there was simply no need for *another* provision to define 'major stationary source' " (Br. 31 (emphasis added)). This suggests what is not the case—that the just quoted Section 111 definition is made applicable to the NSR program by some other provision.

In this connection, respondents refer (Br. 31 n.59) to the fact that the 1976 House bill—unlike the 1977 bill—included a definition of "major stationary source" that refers to the NSPS definition of "source." See H.R. 10498, 94th Cong., 2d Sess. §§ 121(a)(3) and 127(c)(3), at 159, 236 (1976), 7 *Leg. Hist.* 5895 and 5972, 6880 and 6896. However, this provision is not found in either the 1977 House bill or the final statute, and no significance can be attached to it. In addition, the 1976 provision also encompasses "a source which is a major stationary source within the meaning of * * * [the section for the] prevention of significant deterioration of air quality * * *," which, under the decision in *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), requires a plantwide definition of "source." Finally, the 1976 House bill envisioned a new source review program involving a system of variances that would control emissions from new and existing sources—a fundamentally different approach than that taken in the 1977 House bill or the NSR statute enacted by Congress; the definitional provision cannot be separated and viewed in isolation from the substantive program to which it applied.

House intended, in the absence of an explicit cross-reference, to import the NSPS definition of "source" into the NSR program. It begs that question simply to assert that such an explicit cross-reference was unnecessary, in the absence of some independent evidence that the language or structure or functional purposes of the statute suggest such a cross-reference.[17]

The sole "evidence" in fact adduced by respondents is their quotation (Br. 31-32) (footnote omitted) from the

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[17] Respondents rely (Br. 36) on part of a statement made by Senator Muskie during the debates over the Conference Report. Even assuming that great weight can be accorded to a single floor remark (see, *e.g.*, *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 20 (1981); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979)), this statement does not carry respondents' argument. Fairly read in its entirety, it appears to do no more than explain the difference between "new" and "modified" sources—both subject to new source review—and makes clear that a "new" source does not escape review simply because it replaces an older facility that had higher emissions. See 123 Cong. Rec. 26847 (1977), 3 *Leg. Hist.* 355-356.

In addition, respondents (Br. 38) and amicus United Steelworkers of America cite to the history of the Steel Industry Compliance Extension Act of 1981 (42 U.S.C. 7413) to show that Congress contemplated a process-unit definition of "source." The purpose of the Steel Extension Act was to afford assistance to the steel industry by extending certain compliance dates. Neither the Act nor its legislative history focused on the quite unrelated issue of the definition of "source" under existing law. When the Steel Extension Act was under consideration in May and June of 1981, the EPA regulations then in force provided for a dual definition (see Gov't Br. 11-14); thus, it is not surprising that the working assumption of those involved might reflect a process-unit orientation. Cf. *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980). And, given that in March 1981 EPA had published proposed rules allowing states to adopt the plant-wide definition and had invited comment on the matter, the only reasonable assumption is that, if Congress had intended to resolve the issue, it would have spoken with far greater focus than is indicated in the cited legislative record. In these circumstances, deductions drawn from the views expressed in 1981 " 'form a hazardous basis for inferring the intent' " of Congress in enacting the NSR statute in 1977. See *CPSC* v. *GTE Sylvania*, 447 U.S. 102, 117 (1980) (citation omitted); see also, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 182 (1974).

Conference Report of the sentence, "The bill '[d]efines major stationary source and major emitting facility as defined in the Senate bill.'" But the quoted sentence has nothing to do with the question whether "source" means a plant or an individual piece of machinery. As a glance at the context will make clear, it refers exclusively to the fact that the House and Senate bills differed in their definitions of the term "major." The House bill was based on "design capacity to emit 100 tons annually," while the Senate bill referred to "an annual potential to emit 100 tons." The Conference adopted the Senate's definition of "major." H.R. Conf. Rep. 95-564, *supra*, at 172, 3 *Leg. Hist.* 552. The quoted sentence, referring to this action on the quantitative standard for measuring "major" emissions, in no way suggests that the Conference also intended—at the same time that it deleted the Senate's explicit definition of "source"—to endorse the Senate's understanding of the industrial unit that, if "major," would be covered by the NSR program.

IV.

Respondents next argue that EPA has, since 1971, applied the NSPS definition of "source" to new source review (Br. 4, 6, 7, 15-19, 42) and that Congress ratified that approach in enacting the NSR program in 1977 (Br. 11, 33, 42, 43). This argument is without merit.

It is EPA's Emissions Offset Ruling of 1976 that constitutes the proper point of departure for analyzing EPA's approach to the issue in this case (see Gov't Br. 5).[18] There is no quarrel over respondents' contention

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[18] Respondents' reference to EPA's practice back to 1971 is based on the 1970 locational review provisions, which (as we have shown) have no bearing on the question presented here. Furthermore, since those provisions expressly referred to the NSPS section, the fact that EPA in 1971 and 1973 construed or applied the locational review program in light of NSPS is without significance. In fact, EPA's pre-1977 regulations recognized state flexibility to determine the "sources" subject to such review. See 36 Fed. Reg. 22398, 22400, 22406 (1971); 38 Fed. Reg. 15834, 15835, 15836 (1973).

(Br. 16-17, 34) that the Offset Ruling, in referring to a "major source," essentially tracked the language of the NSPS definition (41 Fed. Reg. 55528 (1976)). Nor can it be disputed that Congress was well aware of the Offset Ruling when it passed the 1977 Act.[19] But we find no evidence of congressional intent to ratify—indeed, to freeze—this definition of "source" for purposes of the NSR program.

The critical fact is that in 1977 Congress determined that the Offset Ruling should not be enshrined into permanent national policy. It was adopted as a temporary measure to apply to nonattainment areas until July 1, 1979. See 42 U.S.C. 7502 note, 3 *Leg. Hist.* 251.[20] Even in this interim period, the one specific feature of the Ruling that Congress addressed—the "baseline" to be used for calculating the level of available offsets (*ibid.*)—was amended to make it easier to build or alter a "source" in nonattainment areas. And with respect to all other aspects of the Ruling during the pre-1979 period, the statute expressly provided that they "may be modified by rule of the Administrator" (*ibid.*). Surely this limited interim continuation of the Offset Ruling is a giant step from the proposition that Congress intended in perpetuity to freeze its approach to new source review. In any event, Congress made it clear that it intended no such thing. After the interim period, Congress specified its own approach to the problem of nonattainment. And, in doing so, it stated explicitly that one of the "*two main purposes*" of the NSR program was "*to allow States greater flexibility for the former purpose* [i.e., allowing 'reasonable economic growth to continue in an

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[19] However, EPA did not explain or elaborate on its use of the NSPS language in defining "major source." It is not surprising, therefore, that respondents cannot point to any evidence that Congress knew about or focused on the specific definitional issue.

[20] See also H.R. Conf. Rep. 95-564, 95th Cong., 1st Sess. 157 (1977), 3 *Leg. Hist.* 537; H.R. Rep. 95-294, *supra*, at 14, 211, 4 *Leg. Hist.* 2481, 2678.

area while making reasonable further progress to assure attainment'] *than EPA's present interpretative regulations afford*" (H.R. Rep. 95-294, *supra*, at 211, 4 *Leg. Hist.* 2678 (emphasis added)). Against this background, it is hardly plausible that Congress should have intended, *sub silentio*, to freeze into place an approach to new source review that would prevent the Administrator from giving states any discretion to adopt a definition of the (statutorily undefined) term "source" precisely calculated to achieve the statute's "main purposes."

We submit that the most significant fact about the "administrative" history of the question at issue is not the pre-1977 history at all. It is that, ever since the 1977 Amendments were adopted, EPA has taken the position that the statute does not itself mandate one authoritative definition of "source" for purposes of new source review. As our principal brief recounts in detail (at 9-14), from the first time that it addressed the 1977 Amendments the agency has asserted the *power* to allow states to adopt a plantwide approach. (Respondents' argument (Br. 18) that EPA's 1979 proposals were somewhat narrower than the rules adopted in 1981 is, of course, irrelevant on the question at issue: whether EPA has power to permit states to use the "bubble" concept at all.) In fact, when EPA in August 1980 adopted the dual definition, it did not assert that it has no discretion in the premises; its action constituted an exercise of that discretion. This case is, then, one for the application of the conventional rule of administrative law that a court should defer to the agency's view of its own authority under a statute committed to it for enforcement. See Gov't Br. 22.

V.

Respondents deploy various policy arguments to show that the "bubble" approach will subvert the purposes of the Clean Air Act. They contend, first, that the EPA regulation is invalid because it does not require a greater-

than-even offset and therefore conflicts with the purpose of "[m]aking the construction of major new sources a force for reducing pollution" (Br. 38). As shown in our opening brief (at 26-27, 28, 35), however, the purpose of new source review is to ensure that emissions from new or modified sources do not prejudice the transition to attainment. New source review is only one part of an integrated and complex scheme; it was not designed to carry by itself the burden of improving air quality in nonattainment regions. By looking to the net impact on pollution levels of a new or modified source, the plantwide definition serves the preventive objective of the NSR program.

Respondents also object (Br. 4, 18, 20, 40 n.69) that the EPA regulation does not require new source review even when there is not a total offset in emissions at a plant. This objection, however, does not bear on the issue of the NSR definition of "source." Rather, it is an attack on the significance levels that EPA has set pursuant to the decision in *Alabama Power Co.* v. *Costle*, *supra*,[21] which were not challenged in a proceeding for judicial review and whose validity is not before the Court. It should also be noted that respondents' argument applies to the dual as well as the plantwide definition: the significance levels are applicable under both definitions (see Gov't Br. 6 n.10, 9 n.14, 28 n.36). In fact the increases permitted by the significance levels are truly de minimis (see Gov't Br. 28 n.36). The NSR statute itself excludes—as "minor"—sources that emit less than 100 tons per year of a pollutant (see Gov't Br. 6 n.10, 9 n.14); surely it should not be read to require a dual definition of "source" in order to trigger review of every marginal increase in emissions. The existing EPA regulation fairly effectuates the statutory purpose of new source review: to ensure that emissions

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[21] See Gov't Br. 6 n.10; 40 C.F.R. 51.18(j)(1)(x); 40 C.F.R. 52.24(f)(10); 45 Fed. Reg. 52676, 52705 (1980).

resulting from economic growth and industrial expansion do not interfere with the goal of attainment.[22]

Respondents further urge (Br. 2, 4, 32, 40-41) that it is illogical and contrary to the purposes of the Act to require new source review when a large piece of equipment is installed at a new site, but not to require it when that same piece of equipment is installed (and offsetting pollution reductions are made) at an existing plant. But, once again, respondents have overlooked the "hold harmless" purpose of new source review in the overall context of the nonattainment program. In the case of the existing plant, the plantwide definition ensures that the industrial modernization or expansion does not interfere with air quality attainment. On the other hand, the project at the new site, by hypothesis,

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[22] As discussed in our opening brief (at 13, 14, 29-34), the plantwide definition can facilitate reductions in emissions by encouraging the replacement of older, heavily polluting equipment with newer, cleaner equipment. (Respondents' claim that this contention was abandoned in the court of appeals (Br. 22, 44, 45, 46) is unfounded; see EPA C.A. Br. 12, 37 n.34.) Respondents echo (Br. 42, 44-47) the court of appeals' criticism (82-1005 Pet. App. A18 n.41 (emphasis in original)) that, "in abandoning [in 1981] its earlier position [in the 1980 regulation], EPA did not cite, nor have we found in the record, any study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality *in the aggregate* * * * by discouraging replacement of older processes or equipment with newer, cleaner varieties." This fails to recognize that the Administrator's conclusion involved a prediction of how business and investment decisions would differ in response to the plantwide and dual definitions. "[T]o the extent that factual determinations were involved * * *, they were primarily of a judgmental or predictive nature * * *. In such circumstances complete factual support in the record for the [agency's] judgment or prediction is not possible or required * * *." *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-814 (1978). In fact, EPA had as much record support in promulgating the plantwide definition as it had in adopting the dual definition—a definition that had been in place for only seven months when the proposed change was announced. The critical point is that the agency gave a full and reasoned explanation for the change in the rule. Compare *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Co.*, No. 82-354 (June 24, 1983), slip op. 10-11, 26.

results in a new increase in emissions that significantly worsen the level of pollution, thus interfering with the goal of attainment. To make new source review a function of a project's *net* impact on air quality and its consequences for attainment, as the plantwide definition does, is in full accord with the design and purpose of the NSR program.[23]

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[23] For the same reason, there is no merit to respondents' argument (Br. 40-41) that the EPA regulation improperly discriminates between existing and new business competitors in a nonattainment area.

In much the same vein, the amici states argue that the EPA regulation, by not requiring a uniform national definition of "source," will allow a state to be pressured into adopting the definition that minimizes its environmental controls in order to attract new businesses; in effect, amici ask the Court to relieve them of the hard choices about accommodating growth and environmental protection (see State Am. Br. 11) that Congress desired in 1977 to leave to the states. Their argument—which would be satisfied by any nationwide definition and therefore lends no support to the dual definition as such—overlooks the fact that the Act requires the states to have an EPA-approved implementation plan that conforms to the requirements of the Act and provides for reasonable progress toward and timely attainment of national air quality standards. That states have flexibility to design the detailed methods and enforcement procedures for achieving attainment, consistent with federal law, and to make economic choices between existing and new sources or between present and future growth, is exactly what Congress intended in 1977 (see Gov't Br. 23, 35-41); indeed, the statutory provision that allows a state to budget, at its option, an emissions allowance for growth (42 U.S.C. 7502(b)(5)) clearly reflects this intent. Amici have cited nothing in the legislative history to indicate that Congress was so concerned about economic competition among states that it decided to eliminate the very state flexibility it said it was trying to increase. In fact, where Congress spoke to that issue, it did so in other programs, such as NSPS (see H.R. Conf. Rep. 95-564, *supra*, at 129, 3 *Leg. Hist.* 509; H.R. Rep. 95-294, *supra*, at 11, 184, 4 *Leg. Hist.* 2478, 2651; 123 Cong. Rec. 26846 (1977) (remarks of Sen. Muskie), 3 *Leg. Hist.* 353). Finally, given the numerous other differences among states in environmental and economic conditions, we do not believe that state flexibility regarding the definition of "source" will have a significant impact on the complex considerations that underlie the decisions of states and businesses; in fact, a recent study has concluded that environmental regulation has virtually no effect on a

VI.

Respondents lastly contend (Br. 4-5 n.11, 19-20, 40 n.69, 42, 44) that the EPA regulation, even if valid with respect to construction or modifications in areas in which there is an approved state implementation plan, is improper in areas that do not have an approved plan and are subject to the construction moratorium (see Gov't Br. 7). Respondents suggest no reason why EPA should be required to give two different meanings to the term "source" in the NSR program,[24] and to do so would exacerbate the regulatory complexities and burdens that the 1981 regulations were intended to reduce (see Gov't Br. 12-14, 35 n.45). Furthermore, the regulation is consistent with the purposes of the moratorium: by allowing industrial growth that does not adversely affect air quality while prohibiting both the construction of all new facilities and the renovation of existing facilities for which there is a non-de minimis emissions increase, it prevents a deterioration in air quality during the period an approved implementation plan is not in place and provides a strong incentive for the prompt submission of a plan that complies with federal requirements (see Gov't Br. 27-28 n.35, 29 n.37, 34-35 n.44). Accordingly, application of the EPA regulation in areas subject to the construction moratorium is not invalid.

VII.

Even if the NSPS definition of "source"—"any building, structure, facility, or installation which emits or may emit any air pollutant" (42 U.S.C. 1857c-6(a)(3) and 7411(a)(3))—were formally applicable to new source review, it would not resolve the question pre-

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company's decision where to locate its operations. See C. Duerksen, *Environmental Regulation of Industrial Plant Siting* 56-71 (Conservation Foundation 1983).

[24] As the court below noted (82-1005 Pet. App. A17 n.40), the moratorium "has been cast, not as a discrete program, but as an integral part of a larger production, the nonattainment scheme."

sented in this case: the industrial unit or entity that is subject to such review. Consistent with general principles of administrative law, the D.C. Circuit has recognized, in this case[25] and in other cases involving the Clean Air Act,[26] that EPA has discretion to construe the constituent terms of the definition in light of the language, history, and purposes of the particular program under consideration; as these decisions "illustrate, different delineations may be appropriate for different statutory programs" (82-1005 Pet. App. A9 n.22). Once the "bright line" test adopted by the court below is set aside—as even respondents do not contest it must be—there is no reason why the terms "building," "structure," "facility," and "installation" cannot be understood to embrace an entire plant rather than a specific, individual item of equipment.[27]

Respondents offer two arguments in response to this analysis. First, they assert (Br. 29-30 n.56) that a dual definition applies throughout the Clean Air Act and that *Alabama Power* supports that conclusion. But *Alabama Power* does no such thing. As the court below understood (82-1005 Pet. App. A2-A3, A13, A16), *Alabama Power* clearly holds that the plantwide definition is required in the PSD program and that the dual definition is impermissible (636 F.2d at 396-398, 401-402).[28]

Second, respondents argue (Br. 8, 27, 41-42) that in the NSPS program itself every individual piece of

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[25] 82-1005 Pet. App. A9 n.22.

[26] *Alabama Power Co.* v. *Costle*, 636 F.2d at 396-398, 410; *ASARCO, Inc.* v. *EPA*, 578 F.2d 319, 324 n.17 (1978).

[27] We note that in any event the NSPS definition in no way requires a *dual* definition of "source."

[28] In *Alabama Power*, the court stated (636 F.2d at 397) that, in order "[t]o allow an entire plant or other appropriate grouping of industrial activity to be subject as a single unit to PSD, as Congress clearly intended, EPA should devise regulatory definitions of the terms 'structure,' 'building,' 'facility,' and 'installation' to provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership."

pollution-emitting equipment must be deemed to be a "source." Again, this is incorrect. The NSPS program calls upon the Administrator to "publish * * * a list of categories of stationary sources * * * [that] in his judgment * * * cause[], or contribute[] significantly to, air pollution" (42 U.S.C. 1857c-6(b)(1)(A)) and 7411(b)(1)(A)), and to establish "Federal standards of performance for new sources within [each] such category" (42 U.S.C. 1857c-6(b)(1)(B) and 7411(b)(1)(B)); in establishing such standards the Administrator is authorized to "distinguish among classes, types and sizes within categories of new sources" (42 U.S.C. 1857c-6(b)(2) and 7411(b)(2)). Thus, in the NSPS program itself, the Administrator exercises discretion and judgment in listing categories of sources and in determining the appropriate "source" to be subject to a given standard. In contrast, if the NSPS meaning of "source" were simply carried over to new source review, such flexibility would be lost. Instead—and this is the very result respondents seek—the NSR program would rigidly encompass any and all industrial units that fall within the expanse of the NSPS definition. Such an outcome wrenches the NSPS definition from its substantive and statutory context; it is neither good law nor good sense.

This brings us back to where we began. Our submission is that the definitional issue in this case is, like many other questions brought to the courts, a matter of sound policy, not legal validity. Respondents bear a heavy burden in challenging that submission. To prevail, they must demonstrate that the Act precludes the regulation and that the Administrator has no discretion—either in promulgating a definition of "source" for NSR or in interpreting the constituent terms in the NSPS definition. Nothing in the text, history, or policies of the Act, or in its administrative implementation, warrants such an extreme conclusion.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

FEBRUARY 1984

APPENDIX A

As enacted in 1970, Section 110(a), 42 U.S.C. 1857c-5(a), provided in pertinent part:

State implementation plans for national primary and secondary ambient air quality standards

(a) Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c-4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he

determines that it was adopted after reasonable notice and hearing and that—

* * * * *

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply[.]

* * * * *

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c-6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

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Nos. 82-1005, 82-1247 and 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A. INC., a corporation,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING THE POSITION OF PETITIONERS

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING THE POSITION OF PETITIONERS

This brief amicus curiae in support of the position of petitioners is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Mid-America Legal Foundation ("Mid-America") has an interest in the disposition of the case which is before this Court on writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), based upon the expertise and purpose of this organization.

Mid-America was organized in 1975 to engage in legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in issues of a national scope that originate in or have a direct effect on the mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin.

The mid-America region is one of the most important manufacturing areas of the nation. At least three states in the area have proposed use of the "bubble concept" in conjunction with the requirements of the Clean Air Act.[1] The decision below, which invalidated use of the bubble in the context of the new source review requirements in nonattainment areas, could hamper seriously the ability of states to accelerate compliance with clean air standards.

Amicus presents data from the Harvard Business School case study of an air pollution control program utilizing the bubble concept on an existing source at the Middletown, Ohio steel plant of Armco Inc. Although the issue before this Court for review involves a somewhat different application of the bubble than that presented by the Armco experience, the Harvard Study pinpoints an element common to use of the bubble in any context; namely, that use of the bubble

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1 See 48 Fed. Reg. 31,400 (July 8, 1983) (Ohio); 7 Ill. Admin. Reg. 8091 (July 8, 1983) (Ill. Pollution Control Board R81-20 (Docket A)); 325 Ind. Admin. Code 2-4 (1983) (Ind. Air Pollution Control Board).

can improve air quality and accelerate compliance with clean air standards.

SUMMARY OF ARGUMENT

The court of appeals has invalidated regulations of the Environmental Protection Agency that allowed the application of a bubble concept to new source review requirements in areas which have not attained the national ambient air quality standards under the Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. IV 1980) (the "Act"). It did so by ruling that the bubble concept is incompatible with those provisions of the Act that aim toward improving rather than merely maintaining air quality. 685 F.2d at 726-27; Chevron Pet. Cert. App. at A-16-18. This ruling rests upon a misconstruction of both the Clean Air Act and ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978).

First, there is no inconsistency between the bubble concept and either the language of the Act or the purpose of Congress in bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part

D of the Act, 42 U.S.C. §§ 7501-7508. In fact, as the Harvard Study presented herein demonstrates, considerably greater improvement in air quality may be achieved with the bubble concept than without it.

Second, absent such inconsistency, the policy judgment of the Administrator of the Environmental Protection Agency, which is reflected in the challenged regulations, must be sustained. Batterton v. Francis, 432 U.S. 416 (1977), and Train v. NRDC, 421 U.S. 60 (1975). Contrary to the decision of the court of appeals in this case, ASARCO did not hold otherwise and should not have been dispositive.

ARGUMENT

Mid-America contends that the decision of the court below rests upon a faulty construction of the Clean Air Act and upon a misapplication of the court's earlier decisions in ASARCO and Alabama Power Company v. Costle, 636 F.2d 323 (D.C. Cir. 1979). The court below erred when it found a "bright line" distinction between clean air programs designed to enhance air quality and those designed to maintain

existing air quality (with the bubble concept forbidden in the first category and mandated in the second). The court judged irrelevant the fact that the challenged regulation affects only the amount of bureaucratic review that must be conducted and that the regulation in no way lessens the obligations of the States to achieve air quality improvements in nonattainment areas.

By misreading ASARCO, the court was led to assume, incorrectly, that the bubble concept is inconsistent with the enhancement of air quality. The result of this error is that the court below not only undertook an impermissible foray into policy-making, but did so on the basis of an erroneous assumption that made its policy decision self-defeating.

I. Use of the bubble concept is consistent with the improvement of air quality.

Because the challenged regulations operate to reduce the amount of required bureaucratic review, there is (not surprisingly) little direct data on the effects of the bubble under the new source review program. The logic of the opinion below, however,

depends on the proposition that the bubble is incompatible with those programs that aim at the improvement (as opposed to the maintenance) of air quality. For that reason, a compelling analogy is provided by a case study of the use of the bubble at an existing source in a nonattainment area. This study, which involved the air pollution control program at the Middletown, Ohio steel plant of Armco Inc., was prepared for use at the Harvard Business School.[2]

> The Middletown plant site produced 3 million tons of steel yearly, covered 2,600 acres, employed roughly 7,000 people, and stockpiled (depending on the season) something on the order of 670,000 tons of raw materials. Its various operations were well monitored by the EPA. Even though measurements at only one of the monitoring stations on the periphery and in the vicinity of the plant exceeded the primary TSP [total suspended particulate] ambient air standard of 75 ug/m^3 (micrograms per cubic meter, a measure of density), that single station resulted in the Middletown area's being designated a "nonattainment" area.

Harvard Study Part A, at 1 (exhibits and footnotes

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[2] A. Kantrow, D. Dyer, and J. Fox, Armco and the Bubble Policy, (1981) (distributed by HBS Case Services, Harvard Business School, Boston, Massachusetts 02163 (herein cited as the "Harvard Study").

omitted).

To deal with Armco's problem and others like it, Congressional hearings and a White House conference were held. In addition, Anthony Solomon, the Undersecretary of the Treasury for Monetary Affairs, chaired a special task force on industry problems whose recommendations appeared in a December, 1977 report, A Comprehensive Program for the Steel Industry. The Committee recommended that government and industry cooperate in a fresh study of the problems of pollution control. Harvard Study at 2.

The traditional regulatory approach to particulate emissions had been based on short-term engineering convenience. The original regulatory structure under the Clean Air Act had to be developed quickly and had to employ then-available engineering techniques which could be implemented promptly. .This stopgap approach, however, left room for considerable improvement as a comprehensive program for overall air quality. Id. at 5.

> Emissions standards, as then fixed by legislation, generally applied on a process-by-process basis to each individual stage of the steelmaking operations. They also applied, on a point-by-point basis, to

> individual sources of pollution. As a result, plants in violation of ambient air standards for total emissions could not remedy the situation merely by undertaking that mix of corrective actions that would have the greatest immediate effect on overall ambient air quality. Even though the problem had to do with the general level of TSP emissions, corrective action had to be addressed to specific contributory sources - whether or not they were responsible for the bulk of the problem.

Id. at 5. Thus, the stack by stack control approach that originally had been adopted merely because it afforded the easiest method of measuring emissions from stacks did not necessarily lead to the most effective reduction of air pollution.

This regulatory scheme contained several flaws that resulted in counterproductive attempts at pollution control. For example, the view that success in pollution abatement should be measured solely in terms of the absolute level of TSP reduction per individual source ignores the differences in marginal costs for improvements at a given smokestack. As the Harvard Study pointed out, the first 95% of TSP reduction for an electric furnace costs 3.5¢/lb; the next 4%, 30¢/lb; and the final 1%, $35.00/lb. Id. at 6. When

attempting to regulate steel or any financially pressed industry, such numbers cannot be ignored.

Similarly, the traditional approach tended to overlook the fact that pollution control requires energy and that the production of energy itself causes pollution. There is a law of diminishing returns in control activity, and there is even a point where additional pollution control equipment indirectly creates more pollution than it prevents. For example, Armco noted that:

> to produce the electricity to run the fans and the motors to clean up the scarfing machines [at the Kansas City plant] meant that the local power plant would produce more pollution than [the control devices would] capture.

Id. at 6-7 (footnote omitted).

In search of alternatives to this kind of self-defeating regulation, EPA hired the Midwest Research Institute to develop a scientific basis for accurately estimating pollution from open dust sources, which hitherto had escaped control simply because such pollution was hard to measure. By 1978, the Institute had developed a series of emissions factor equations that made possible for the first time a full inventory of

pollution sources at an industrial site. This new technique, using a methodology called "exposure profile sampling", disclosed some surprising facts about Armco's Middletown plant.

> Contrary to expectations, roughly 60% of particulates came neither from stack nor process emissions but, instead, from open dust sources. Even when differential particle size was taken into account, the result remained pretty much the same. For all particulates less than 30 um (microns), open dust emissions were six times greater than process fugitive emissions, which were the focus of EPA concern. For particulates less than 5 um (the size most responsible for ambient air quality more than 1 mile from an industrial site), open dust emissions were still three times greater than process fugitive emissions.
>
> Given these figures, [Armco officials] realized that "there [was] very little room for further reduction [in TSP levels] from presently controlled sources by adding more efficient controls." To attack the remaining smokestack or process emissions would be to direct Armco's efforts toward a relatively minor part of the problem. . . .
>
> . . .To cite the most striking example, controlling windblown emissions from raw materials piles would remove 284 tons of particulates from the air each year (a reduction of some 60%) at a capital cost of $200,000 - or $704 per ton - and with an energy expenditure of 46 KWH per ton. By contrast, controlling fugitive emissions from open hearth operations would remove only 64 tons of particulates from the air each year (a reduction of 80%) at a capital cost of $4,000,000 - or $63,992 per ton - and with an energy expenditure of 179,700 KWH per ton. These were staggering numbers

> indeed. By focusing efforts on open dust instead of process fugitive sources, Armco could get more particulates out of the air at 1/89th the cost per ton and with 1/3906th the energy.

Id. at 8-9 (exhibit and footnote omitted).

After a thorough study and on-site monitoring of a pilot project for the Middletown plant, EPA announced the expected approval of Armco's bubble by EPA Administrator, Douglas M. Costle. In a press release issued October 20, 1980, EPA stated:

> 'It is our judgment that Armco will be able to satisfy the bubble requirements and EPA will be able to act favorably on Ohio's State Implementation Plan for the area affected by the plant when it is submitted by the State,' Costle said.
>
> . . . .
>
> . . .A joint air monitoring study by federal, state and local governments and Armco has confirmed in a pilot project that this bubble is effective and has resulted in significant improvements in air quality.
>
> Armco's 'bubble' dust control plan would eliminate 4,000 tons per year of particulates as compared to 652 tons per year under existing regulations.

Harvard Study, Part D, Ex. 2, p. 2-3 (quoting EPA "Environmental News") (emphasis added).

Following submission of the required technical support documents, EPA formally proposed the conditional approval of the Ohio plan on January 27, 1981,

46 Fed. Reg. 8683, and gave that approval on March 31, 1981, 46 Fed. Reg. 19468. The Harvard Study and the data obtained by EPA in support of the Ohio plan illustrate that a policy allowing use of the bubble concept can provide significantly greater improvement in air quality than a policy which precludes it.

In addition to providing greater improvements in air quality, the bubble policy may also speed up the achievement of clean air standards because it enables firms operating the sources of air pollutants to revise their control policies to achieve the most cost effective method of meeting the requirements of the Act. Plant engineers are thus encouraged to invent new and more effective pollution control devices.

> Traditional 'command and control' regulations may actually deter the development of new technology because firms, fearing that new items of capital equipment will be specifically required, may hide information about more effective means of pollution reduction. By contrast, the bubble would serve as an incentive for developing cost-effective pollution control technology since, when not forced to use particular technologies, a buyer will choose the least expensive means of satisfying emissions limitations.

Comment, An Overview of the Bubble Concept, 8 Colum. J. Envtl. L. 137, 155 (1982).

It should also be pointed out that the bubble concept is not a device that substitutes control of less harmful emissions in a tradeoff for more hazardous air pollutants. The equivalence of tradeoffs can and should be addressed directly. Limitations designed to ensure that the facility-wide definition of stationary source is used to improve air quality and meet other requirements of the Act are quite compatible with the bubble concept. See EPA's Widening Embrace of the Bubble Concept: The Legality and Availability of Intra-Source Trade-Offs, 9 Envtl. L. Rep. 10027, 10029 (1979).

Thus, since the use of the bubble concept has been shown to be capable of improving air quality, use of the bubble in nonattainment areas is not inconsistent with the purpose of Congress in enacting Part D of the Act.

II. The policy judgment of the Administrator was rejected in a way that conflicts with Batterton and Train.

It is well established both by principles of administrative law and by the decisions of this Court that in

the absence of a conflict between the policy judgment of an agency administrator charged with responsibility for implementing a federal statute and either the language or purpose of the statute, the agency decision must be sustained. See Administrative Procedure Act, 5 U.S.C. § 706 (1976); Batterton v. Francis, 432 U.S. 416 (1977); and Train v. NRDC, 421 U.S. 60 (1975). In the decision below, that principle was turned on its head when the court of appeals substituted its judgment for the policy decision of the EPA Administrator to approve state implementation plans allowing the use of a bubble concept which is based on the language of the Act itself.

The presumption in favor of the agency's policy judgment is based on practical concerns about the proper utilization of agency expertise. As noted in Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978):

> The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the construction and administration of a given statute or its predecessors. Where, as here, the agency has extensive experience, has relied on the common meaning of the relevant statute's specific language, and can point to important

> congressional purposes furthered by its interpretation, only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations.

The special competence of EPA to interpret its mandate under the Clean Air Act is well recognized. In Train, this Court sustained an EPA regulation as "sufficiently reasonable" without going so far as to hold that such construction was "the only one it permissibly could have adopted." 421 U.S. at 75.

This Court has also noted that judicial review should allow a proper degree of flexibility for administrative proceedings:

> The fact that the interpretation placed on the section by the Agency may on occasion require administrative flexibility and ingenuity to a greater degree than would a more rigid alternative is not, of course, a reason for rejecting the Agency's otherwise reasonable construction.

421 U.S. at 94 n. 28.

The limitations on judicial review of administrative action were reiterated by this Court in Batterton as follows:

> In a situation of this kind, Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A

> reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

432 U.S. at 426.[3]

Under these circumstances, where there is no conflict with the language of the Act, a reviewing court should confine itself to deciding whether the Administrator "exceeded his statutory authority" and whether the "regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. The decision below clearly failed to do so. As a result, the court of appeals substituted its judgment for a policy judgment of the EPA Administrator that does not conflict with either the language or the purpose of the Act.

Obviously there is no conflict with the language of the Act, which was used verbatim by the EPA

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[3] Here, the court of appeals noted specifically that "EPA, it is not disputed, has authority to define the constituent terms of source enumerated in the statute ('building, structure, facility or installation') in a manner that will best effectuate the expressed purposes of the Act." 685 F.2d at 723 n. 22; Chevron Pet. Cert. App. at A-9 n. 22.

Administrator. Nor is there any conflict with any purpose of the Act. The challenged regulations in absolutely no way reduce the obligations of the States or the affected industries to proceed with the cleanup of the air in nonattainment areas. Indeed, as the Harvard Study demonstrated, the bubble actually may speed up the attainment of air quality standards in such areas.

Instead of pointing to a conflict with the language or purpose of the Act, the court relied solely on its prior decision in ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978), as having established that the bubble concept is inconsistent with the improvement of air quality.[4] ASARCO, however, held neither that the bubble concept is incompatible with improving air quality, nor that use of the bubble is forbidden in nonattainment areas.[5] The regulation involved in

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[4] 685 F.2d at 727-28; Chevron Pet. Cert. App. at A-16-17. "We express no view on the decision we would reach if the line drawn in Alabama Power and ASARCO did not control our judgment." Id. at 720 n. 7; Chevron Pet. Cert. App. at A-4 n.7.

[5] Amicus here assumes arguendo that ASARCO was

ASARCO sought to redefine the statutory term "facility" in Section 111 of the Act to mean "a combination of such units." 578 F.2d at 327. This was rejected as "inconsistent with the language of the Act." Id. (emphasis supplied). The ASARCO court clearly stated that its consideration of "the purpose of the Clean Air Act and Section 111" merely "reinforced" its decision, which was based on this conflict between the language of the regulation involved in that case and the language of the Act. Id. No such conflict exists in the present case. The regulation here at issue incorporates the relevant statutory language verbatim. It does not redefine "facility" or any other statutory term.[6] Accordingly, since the basis of the ASARCO decision is completely inapplicable to this case, it should not have been dispositive here.

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correctly decided on its own terms. The alternative argument that ASARCO should not be dispositive here because it was incorrectly decided and conflicts with Alabama Power must also be noted. See Chevron Pet. Cert. pp. 7-10.

[6] ASARCO expressly noted that, in proper circumstances, the statutory term "facility" could cover an entire plant. 578 F.2d at 324 n. 17.

The reinforcing dictum of ASARCO that the bubble concept is inconsistent with "the purpose of the Clean Air Act and Section 111," could not and did not establish that the different application of the bubble concept which the Administrator here adopted in the verbatim language of Section 111 is inconsistent with the improvement of air quality under Part D of the Act.[7] By ruling otherwise, the court below failed to make even one of the rulings or findings required to set aside the action of the Administrator under the Administrative Procedure Act, 5 U.S.C. § 706. Policy decisions of an agency are "entitled to more than mere deference or weight" and can be set aside only if the Administrator "exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Batterton v. Francis, 432 U.S. at 416, 426.

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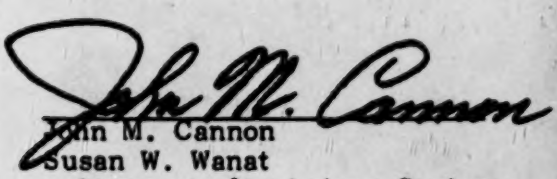
[7] 578 F.2d at 327-30 (emphasis added). Even if ASARCO had done so, such a conclusion would be subject to reconsideration as inconsistent with the factual data subsequently developed by EPA, including the measurement techniques developed for EPA by the Midwest Research Institute and the joint monitoring study at Middletown. See pp. 11-14 supra.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,



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Nos. 82-1005, 82-1247, and 82-1591

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OF THE

United States

OCTOBER TERM, 1982

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Petitioner,

VS.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

VS.

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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

Pacific Legal Foundation (PLF) respectfully submits this brief in support of petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, and Administrator, United States Environmental Protection Agency pursuant to Rule No. 36 of the revised Rules of the Supreme Court of the United States. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Organized and operating under the laws of California, PLF is a nonprofit, tax exempt public interest law firm with over 18,000 contributors located throughout the country. Policy is set by a 18-member Board of Trustees, composed of concerned citizens, a majority of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action of the Foundation and authorizes legal action only where PLF's position has broad support within the general community and is in the public interest. The PLF Board of Trustees has authorized the filing of this brief amicus curiae.

Due to its unique perspective of representing the public interest, PLF is most interested in a resolution of the statutory and public policy issues inherent in application of the plantwide definition of "source" in nonattainment areas (areas in which air quality does not meet federal standards) and thus in the litigation at bar. The interest of PLF is heightened as a consequence of many PLF contributors and members of PLF's Board of Trustees residing in areas subject to the regulations at hand.

Further, PLF believes that there is great public interest in achieving clean air by means which consider the economic well-being of this nation. Thus, there is also significant public interest in the activities of Environmental Protection Agency (EPA) in enforcing the Clean Air Act. The regulations at issue here are of particular public interest in that they seek to strike a delicate balance between the congressionally mandated requirements to attain clean air and to enhance the economic well-being and productive capacity of the nation's population.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 685 F.2d 718 (D.C. Cir. 1982).

SUMMARY OF ARGUMENT

I. The purposes and goals of the nonattainment sections of the Clean Air Act (42 U.S.C. §§ 7501 through 7508)[1] include enhancement of this nation's economic well-being. This premise is supported by 42 U.S.C. § 7401(b)(1), which defines the purposes of Subchapter I—Programs and Activities (which encompasses the nonattainment provisions), as well as the legislative history of the bill which established the nonattainment provisions of the Clean Air Act. Due to the fact that enhancement of the economy of the United States is one of the congressionally mandated

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[1]Throughout this brief, reference is made to the nonattainment sections of the Clean Air Act. Such reference is limited herein to 42 U.S.C. §§ 7501 through 7508 and the requirement therein that nonattainment permits are a prerequisite to the construction and operation of new or modified major stationary sources.

purposes of the nonattainment program administered by EPA, satisfaction of this goal is properly pursued through the regulations promulgated by EPA. Pacific Legal Foundation argues that enhancement of national productive capacity was a proper consideration of the October 14, 1981, EPA regulations in question.

II. Scientific and environmental spokesmen agree with EPA that the economic needs of the country must be considered when promulgating environmental regulations. Their statements reflect a broad consensus for and the importance of considering the economic needs of the United States in developing environmental programs and policy.

III. States have the primary responsibility for implementing and meeting the goals of the Clean Air Act, yet to do so they need substantial flexibility in choosing their strategies. The latitude to be granted the states must include the option to adopt a plantwide definition of source. Allowing the states to adopt a plantwide definition of source will not permit states to avoid meeting national air standards, nor will it preclude states from establishing a more stringent definition of source.

IV. Both goals of the nonattainment provisions of the Clean Air Act, enhancement of the nation's productive capacity, and attainment of ambient air quality standards are met with EPA's plantwide source definition. They are not met by use of the prior dual source definition which is preferred by the court below. Since EPA will allow a state to use the bubble concept only if reasonable further progress toward attainment of air quality standards is shown through an EPA approved state implementation plan, the plantwide definition will not negatively impair

reaching national air quality standards. This is particularly true since utilization of the plantwide definition of source provides industry with the economic incentives to replace older, polluting equipment with newer less polluting equipment. This economic incentive is noticeably absent in the use of the dual definition of source which, as a consequence, has contributed to a slow growth economy. This negative impact on the economy and on air quality is contrary to the goals of the nonattainment program and may be corrected through use of the plantwide definition of source.

V. The court below abused its judicial discretion and violated the applicable standard of review in this case. The law articulates a standard of wide discretion which is to be accorded administrative agencies in their promulgation of regulations. The scope of judicial review is narrow and a reviewing court may overturn regulations adopted by an agency only if such regulations are adopted in a manner which is arbitrary and capricious. EPA substantiated its promulgation of the regulations at issue and acted within the wide latitude accorded an agency. The action of the court below in vacating the October 4, 1981, regulations violated the standard of review.

ARGUMENT

I

THE GOALS OF THE NONATTAINMENT PROVISIONS OF THE CLEAN AIR ACT INCLUDE ENHANCEMENT OF THIS NATION'S ECONOMIC WELL-BEING

The Clean Air Act admonishes that among the purposes of its programs is the enhancement of economic well-being.

Title 42, United States Code, Section 7401(b)(1) clearly states:

> "The purposes of this subchapter are—to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare *and the productive capacity of its population.*" (Emphasis added.)

Legislative history of the nonattainment provisions of the Act expressly states that one purpose is "*to allow reasonable economic growth* to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date." H.R. Rep. No. 294, 95th Cong. 1st Sess. 211, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1290 (emphasis added). *See also* H.R. Rep. No. 294 at 13, 1977 U.S. Code Cong. & Ad. News at 1091, for the proposition that the goals of the nonattainment program were equivalent to the goals of Subchapter I—Programs and Activities (42 U.S.C. §§ 7401 through 7508), those goals being to attain air quality standards and to provide for new economic growth. Further history of congressional intent to allow economic development in nonattainment areas is found in comments made on the floor of the House by California Congressman Henry Waxman. Representative Waxman, a noted environmental proponent, stated

prior to the vote on the 1977 amendments to the Clean Air Act that: "We have struck a proper balance between environmental controls and economic growth in the dirty air areas of America. . . . [N]either [pollution control nor new jobs] need be compromised." 123 Cong. Rec. 27,076 (1977).

Courts have adhered to this statutory mandate. In enacting standards for state implementation plans needed to meet national ambient air quality standards, EPA must weigh economic factors. *Anaconda Company v. Ruckelshaus,* 482 F.2d 1301, 1306 (10th Cir. 1973). *See also Pacific Legal Foundation v. Andrus,* 657 F.2d 829 (6th Cir. 1981); *Environmental Defense Fund, Inc. v. Costle,* 631 F.2d 922 (D.C. Cir. 1980). However, the court below ignored these precedents and determined that the favorable economic advantages of the plantwide definition were irrelevant. This is clear error.

II

EVEN ENVIRONMENTAL AND SCIENTIFIC SPOKESMEN AGREE THAT AS A MATTER OF POLICY PROMULGATIONS OF ENVIRONMENTAL REGULATIONS MUST CONSIDER ECONOMIC NEEDS OF SOCIETY

In addition to Congress and the courts, the scientific community has also begun to recognize the imperative of considering the economic needs of society when devising environmental protection programs.

Recently Mr. Gus Speth, President of World Resources Institute and former chairman of the Council for Environmental Quality, emphasized that

> "[t]he environmental community should realize the need for considering business and economic concerns.

> . . . Environmental conservation and economic growth are complementary." The Bureau of National Affairs, Inc., 14 *Environment Reporter* 158 (June 3, 1983).

Dr. S. Fred Singer, Professor of Environmental Sciences at the University of Virginia, Senior Fellow of the Heritage Foundation, and a member of the Acid Rain Peer Review Panel of the White House Office of Science and Technology Policy, recently implored to the American Association for the Advancement of Science that cost effectiveness of regulatory programs should be considered by the regulator and that "the 'serious damage' caused by acid rain could be controlled through a 'least cost approach like the bubble plans' now being used for controlling certain air pollutants in limited geographic areas." 14 *Enviromnent Reporter* at 157.

On June 27, 1983, the Acid Rain Peer Review Panel issued its General Comments and recommended that "additional steps should be taken now which will result in meaningful reductions in the emissions of sulphur compounds into the atmosphere beginning with those steps which are most cost effective." Office of Science and Technology Policy, Executive Office of the President, *General Comments on Acid Rain, A Summary by the Acid Rain Peer Review Panel for the Office of Science and Technology Policy* (June 27, 1983).

These comments are only a small sampling but they reflect the serious consideration of the scientific community regarding the use of concepts such as the bubble approach not only to meet clean air goals but also to control acid rain.

That EPA properly considered the economic costs as well as the environmental benefits of its regulations defining source for nonattainment areas is thus not only supported by the statute and case law, but also the rational viewpoints of the scientific community. By all accounts EPA acted within its congressionally approved role.

III

STATES NEED FLEXIBILITY TO ADOPT OR NOT ADOPT PROGRAMS SUCH AS THE PLANTWIDE DEFINITION IN ORDER TO SATISFY THEIR PRIMARY RESPONSIBILITY TO IMPLEMENT THE CLEAN AIR ACT

It is a basic premise that states historically have had the primary responsibility for protecting their citizens' health and welfare.

> "The powers of the states to protect the health and welfare of their citizens by statute, by an action to abate a nuisance, or by other means is well established." Renz, *The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?*, 43 Mont. L. Rev. 199 (1982).

As far back as 1907, states exercised these powers in the area of air pollution. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). In keeping with this role, states were expected to continue to have the primary responsibility in air pollution control through the implementation of the Clean Air Act. This fact was emphasized in the initial federal effort to reduce air pollution, where "the Air Pollution Control Act of 1955, declared that pollution control was the *responsibility of the states.*" Renz, 43 Mont. L.

Rev. at 201 (emphasis added). This Court has recognized that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975).

In order to be able to fulfill its role in implementing the Clean Air Act, a state needs sufficient flexibility. "Wide latitude" is to be accorded the states. *Id.* "The states' powers to guard against these threats [hazards to public health] cannot be limited if the states are to continue their historic role. . . ." Renz, 43 Mont. L. Rev. at 216. Though Congress and some courts have recognized the state's primary role and the need for flexibility, the court below did not.

In the opinion below, the court narrowly defined that the purpose of the nonattainment program was "undoubtedly to improve air quality in regions lagging behind in meeting the NAAQS."[2] *NRDC v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982). It discounted EPA's understanding that the purpose and nature of the nonattainment program was "to afford the states flexibility in designing revised SIPs[3] which will attain compliance with the NAAQS." The Court simply countered that "offering flexibility to the states may be a method of attaining that objective, but it is not an independent goal of the nonattainment scheme."

This is contrary to the intent and purpose of Congress, as reflected in House Report No. 294.

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[2]National Ambient Air Quality Standards (NAAQS). Section 109 of the Clean Air Act, 42 U.S.C. § 7409.

[3]State Implementation Plans (SIPs) for the Attainment, Maintenance and Enforcement of NAAQS. Section 110 of the Clean Air Act, 42 U.S.C. § 7410.

In discussing the nonattainment provisions of the Clean Air Act Amendments of 1977, codified at 42 U.S.C. §§ 7501 through 7508, the House committee stated that there are "two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) *to allow states greater flexibility for the former purpose than EPA's present interpretative regulations afford.*" H.R. Rep. No. 294 at 211 (emphasis added). The lower court's judicial interpretation to the contrary simply does not mesh with legislative history, nor does it mesh with common sense. Congress believed that flexibility must be afforded a state in order to allow a state to meet all the purposes of the Clean Air Act. These purposes include reasonable economic growth. As shown *infra* this nation's economic growth will suffer needlessly if flexibility and the bubble concept are capriciously rejected.

IV

THE PLANTWIDE DEFINITION COMPLIES WITH THE GOALS OF THE NONATTAINMENT PROVISIONS OF THE CLEAN AIR ACT. THE DUAL DEFINITION PREFERRED BY THE LOWER COURT DOES NOT

A. The Plantwide Definition Properly Promotes Attaining Ambient Air Quality Standards

EPA has frequently articulated that if a state chooses to define "source" on a plantwide basis that state is *still* subject to the requirements of 42 U.S.C. § 7502: The SIP must continue to demonstrate attainment of NAAQS and, in the interim until such standards are met, reasonable

further progress (RFP)[4] toward attainment by the statutory deadlines must be demonstrated (46 Fed. Reg. 50,767 (October 14, 1981)). Since a nonattainment state must demonstrate RFP, by definition that state must prove actual reductions in air pollution. And as stated above, demonstration of RFP is not precluded by use of the plantwide definition but, on the contrary, it is required.

For existing sources, EPA restricts the use of the alternative emissions approach in a nonattainment area to the situation where the source does not increase pollution: "[A]ll emissions under the bubble must be quantifiable and trade-offs among them must be equal in order to prove that the alternative emissions approach does not increase the level of overall emissions." Note, *An Overview of the Bubble Concept*, 8 Colum. J. of Envtl. L. 137, 142 (1982), which relies on 44 Fed. Reg. 71,780 through 71,781 (1979). Essentially, these EPA restrictions are present "to ensure that the bubble concept . . . [is] used to improve air quality rather than to continue air pollution." *Id.* As a result, the bubble concept furthers the goals of the nonattainment program by leading to attainment of NAAQS and simultaneously providing for economic growth, the same goals the plantwide definition would accomplish.

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[4]Title 42, United States Code, Section 7501(1) defines reasonable further progress as: "annual incremental reductions in emissions of the applicable air pollutant."

B. The Dual Definition of Source Discourages Air Pollution Reductions While the Plantwide Definition Promotes It Through Incentives

As EPA has repeatedly stated, "the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air." 46 Fed. Reg. 50,766 (October 14, 1981) and 46 Fed. Reg. 16,281 (March 12, 1981). Quite simply, the current "technology-based standards provide little incentive for innovations that reduce emissions below state-of-the-art." Harrington and Krupnick, *Stationary Source Pollution Policy and Choices for Reform*, 21 Nat. Resources J. 539, 544 (1981). Similarly, clean air legislation has "led to serious delays and 'stretch-outs' in investment plans, delays which have the inevitable effect of extending the use of outmoded facilities and retarding technical change and economic growth." Haveman and Christainsen, *Environmental Regulations and Productivity Growth*, 21 Nat. Resources J. 489, 507 (1981). One of the primary reasons for this effect is due to the current regulations under which new sources of pollution are subjected to more stringent standards than existing sources. "This discrepancy between old and new plant requirements tends to reduce investment in plant and equipment, and remaining investment is diverted away from new plant construction and toward rehabilitation of older equipment. Innovation is retarded . . . ." Harrington and Krupnick, 21 Nat. Resources J. at 544.

Alternatively, the alternative emissions approach is believed by many, including EPA, to "actually have a beneficial effect on the development of pollution control

technology [since] the bubble would serve as an incentive for developing cost effective pollution control technology." Note, 8 Colum. J. of Envtl. L. at 155. Distinct from the current technology based pollution control standards, EPA has developed an "emissions trading policy" as an alternative for controlling emissions, which is a market approach to air pollution control. The bubble concept, one of four innovative regulatory mechanisms, takes advantage of market incentives to reduce air emissions at the lowest possible cost.

The Council on Environmental Quality (CEQ) has stated that these innovative regulatory mechanisms, including the bubble concept, "are needed in the 1980's if further gains are to be made at reasonable costs." 13th Annual Report of the Council on Environmental Quality, *Environmental Quality 1982*, 8. To illustrate that the bubble concept does meet the goals established by Congress for the nonattainment program, including reducing air emissions, CEQ cited a 3M factory in Bristol, Pennsylvania, which "used an innovative manufacturing process to *overcontrol* volatile organic compound (VOC) emissions in return for less control on other sources. This bubble reduced VOC emissions 1,000 tons per year more than would have been achieved through conventional compliance." *Id.* Evidence that the dual goals of reaching attainment and enhancing the productive capacity of the population (42 U.S.C. § 7401(b)) are met by the bubble concept is manifest in that "[b]y the end of 1982, EPA's efforts to encourage emissions trading had resulted in a number of *concrete cases where industry had reduced air emissions while simultaneously reducing capital and/or operating costs.*" 13th Annual Report of the Council on Environmental Quality at 76 (emphasis added). Overall, 21 of the 34 bubbles

approved or proposed by EPA reduce emissions further than legally required by NAAQS. *Id.* at 185. As shown by these figures, the bubble concept provides crucial environmental benefits for "through emissions trading, every firm has economic incentives to reduce its pollution beyond the requirements of the law." *Id.* at 184. The plantwide definition for new and modified sources would act in a similar fashion.

The strategy of providing industry with economic incentives to reduce their pollution was thus an important element of the Clean Air Act Amendments of 1977. President Carter actually highlighted this strategy when he signed the 1977 amendments into law: "The Act provides us with a new tool to help abate industrial sources of pollution by authorizing use of economic incentives to reduce noncompliance." Statement of Signing H.R. 6161 Into Law, 13 Weekly Comp. Pres. Doc. 1214 (August 15, 1977). Such important incentives, however, are conspicuously missing from the lower court's preferred approach to the nonattainment program. The plantwide definition strategy to reduce air pollution may be good, or bad, but it is not the court's role to disapprove it because the court prefers another strategy. The evidence shows that EPA's selected strategy not only works to reduce air pollution but also gives a needed boost to economic growth. Congress asked for no more. Neither should the Court.

C. The Dual Definition of Source Has Contributed to a Slow Growth Economy While the Plantwide Definition Will Promote Economic Growth

The environmental regulations promulgated under the Clean Air Act, particularly those which define "source" for

nonattainment areas on a dual basis, have resulted in the impairment of productivity and have contributed to diminished economic growth over the past several years.

The general premise is supported by findings of several legal and economic scholars:

> "Many causes have been suggested for *stagflation and declining productivity growth,* including . . . regulatory activities—in particular *environmental regulations.*" Haveman and Christainsen, 21 Nat. Resources J. at 489 (emphasis added).

"The *environmental policies* with the *greatest impact* on the national economy are probably those that limit industrial air and water pollution." Harrington and Krupnick, 21 Nat. Resources J. at 539 (emphasis added). Further, "it is reasonable to suggest that between 12 and 25% of the slowdown in productivity growth in the private sector of the economy between the early 1960's and the mid-1970's can be atttributed to the entire bundle of federal regulations." Haveman and Christainsen, 21 Nat. Resources J. at 498. And of those federal regulations, a reasonable estimate is that 8% to 12% of the slowdown in productivity is atttributable to environmental regulations. *Id.* at 508. Clearly, our nation's economy has not escaped unharmed from the extensive regulations promulgated by government at all levels and, particularly, the environmental regulations concerning air pollution.

The 8% to 12% loss in the productivity of the economy attributable to environmental regulation directly contravenes the purposes of Subchapter I of the Clean Air Act. This negative impact is partially attributable to the economic disadvantages in the existing approach of implementing the Clean Air Act for, "the existing structure of

air and water pollution regulation, particularly the prevention of significant deterioration and nonattainment provisions of the Clean Air Act, is a potentially serious obstacle to economic growth in the United States." Harrington and Krupnick, 21 Nat. Resources J. at 548.

Contrary to the current regulatory scheme, there are many positive aspects of the bubble concept. The National Commission on Air Quality (NCAQ) indicated that EPA adopted the bubble concept

> "as a result of studies suggesting that substantial cost savings could be achieved [through its utilization]. One study, completed by Maloney and Yandle (1979) for 52 DuPont Corporation plants, showed that allowing the use of the bubble concept at each of the plants to achieve 85 per cent emission reductions would reduce costs of emission control by 35 per cent over point source controls." National Commission on Air Quality, *To Breathe Clean Air: Report of the National Commission on Air Quality* 276 (1981).

NCAQ went on to state that the "resulting emissions will be equal to the emissions that would have occurred if specific point-source reduction had been required, however, substantial savings in costs should be realized." *Id.* at 276-77. The positive aspects of the bubble concept are further illustrated by the fact that during 1981, over 40 companies were developing bubble applications "showing savings of several million dollars each in either capital or operating costs." Harrington and Krupnick, 21 Nat. Resources J. at 557. Overall use of the bubble concept would result in improved allocation of resources, increased productivity and innovation, and reduced inflation. *Id.* at 558. It also is seen as "the means to a considerable reduction in the cost of

environmental policy with little, if any, sacrifice in environmental quality," *id.* at 562, as the bubble concept has been determined to be "environmentally benign," *id.* at 563.

One way to judge air pollution policy is to examine its cost effectiveness, which in this context has been defined as "the ability to achieve given environmental quality goals for the lowest possible costs." *Id.* at 542. In terms of cost effectiveness, NCAQ was correct in their assessment that the bubble policy is "perhaps the best known economic incentive approach to air pollution control." National Commission on Air Quality at 276. NCAQ further stated that utilization of the bubble concept would allow a facility to use a more cost-effective mix of emission reduction measures. *Id.* Thus, use of the bubble concept, which would be allowed only in those state implementation plans which provide for attainment of national ambient air quality standards while showing reasonable further progress, 46 Fed. Reg. 50,767 (1981), would result in reaching air quality standards in a more cost-effective manner. This is also underscored by CEQ's estimation that by "1988, expenditures for pollution abatement and other environmental quality programs will grow to nearly $70 billion in constant (1979) dollars. This represents an estimated annual real rate of growth of 6.6 percent. . . ." Portney, *The Macroeconomic Impacts of Federal Environmental Regulations,* 21 Nat. Resources J. 468 (1981). CEQ also estimates that $31.5 billion will be the cost by 1988 (in 1979 dollars) for water and stationary air quality controls alone. Haveman and Christainsen, 21 Nat. Resources J. at 495.

The purpose of enhancing the productive capacity of the nation cannot be accomplished under the current

environmental regulatory scheme. EPA's adherence to the bubble concept recognizes its statutory charge to consider the economic impacts as well as health benefits. The plantwide definition of source is one application of this concept. It is a step in the right direction fully within the authority of the Clean Air Act and should be upheld.

V

THE LOWER COURT IGNORED THE FACT THAT AN ADMINISTRATIVE AGENCY'S DISCRETION IN PROMULGATING REGULATIONS IS QUITE WIDE WHILE A REVIEWING COURT'S SCOPE OF REVIEW IS VERY NARROW

The decision of the Court of Appeals below can only be viewed as another attempt by that court to substitute its judgment on the propriety of environmental regulatory programs for the judgment of EPA. The Court of Appeals disagrees with EPA's policy decision and has improperly dissected the decision to ascribe an improper administrative motive behind the adoption of the plantwide definition. The court asks too much of itself and gives too little to EPA and such conduct by the court constitutes reversible error. As Justice Douglas stated: "The Court is not empowered to substitute its judgment for that of the agency." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

On June 6, 1983, this Court affirmed a basic premise of administrative law that an agency is to have wide discretion in promulgating regulations and a reviewing court is to have a very narrow scope of review. In *Baltimore Gas & Electric Co., et al. v. NRDC, et al.*, ... U.S. .....,

51 U.S.L.W. 4678 (June 6, 1983), writing for an eight to zero Court, Justice O'Connor stated:

> "Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. . . .'[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached. *Vermont Yankee*, 435 U.S. at 558.'
>
> ". . . The role of the courts is simply to ensure that . . . the [agency's] . . . decision is not arbitrary or capricious." *Baltimore Gas & Electric Co. v. NRDC*, ...U.S. ....., 51 U.S.L.W. at 4680.

The Court continued, stating, "it is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. NRDC*, ... U.S. ....., 51 U.S.L.W. at 4683.

Unquestionably an administrative agency is granted broad discretion to promulgate regulations. In defining *source* on a plantwide basis, EPA properly considered all the relevant factors including the economic impact of its action and articulated a rational connection between the facts found and the choice made. EPA carefully articulated that one policy it was pursuing in defining source on a plantwide basis was the attainment of NAAQS in those designated areas that had not yet achieved those standards (nonattainment areas). *See* 46 Fed. Reg. 50,767 through

50,768 (October 14, 1981). A relevant factor considered in promulgating the plantwide definition—state flexibility—likewise comports with the congressional mandate by enhancing productive capacity as well as promoting public health and welfare. *Id.* Moreover, EPA was "correct to look at the costs as well as the benefits" of the regulation involved. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company,* ..... U.S. ....., 51 U.S.L.W. 4953, 4959 (June 24, 1983).

The *Baltimore Gas* case and the instant case are factually similar—both concern the findings of an administrative agency which are within the agency's area of special expertise. In *Baltimore Gas* the Court stated its scope of review when an agency is acting within its area of special expertise. "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. NRDC,* ..... U.S. ....., 51 U.S.L.W. at 4682. Herein EPA made the expert determination that implementation of the plantwide definition would not only promote public health and welfare by improving the quality of the nation's air but also would promote the productive capacity of this nation's people. Though a reviewing court is required "to give [the agency] some leeway where its findings must be made on the frontiers of scientific knowledge." *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 656 (1980), the lower court nevertheless discounted EPA's finding that the plantwide definition would properly promote clean air in nonattainment areas because of its belief EPA improperly considered the economic impact of its nonattainment program, 685 F.2d at 726-27. The court did not find, nor

could it, that the purpose of meeting NAAQS would not be met but nevertheless rejected the plantwide definition. This amounts to a dispute over the type of program selected by EPA to meet the objective of the Clean Air Act and is clearly outside the scope of judicial review. Unfortunately, the Court of Appeals improperly deferred to its predispositions and ignored EPA's expertise.

The Third Circuit Court of Appeals gives further insight into the role of a reviewing court within the limits of the highly deferential scope of review to be accorded agency promulgated regulations. NRDC complained below that EPA's promulgation of a plantwide definition of source was a substantial departure from the agency's prior definitions and course of rulemaking. Even if this assertion were true, there still is a wide degree of deference to be accorded to the agency's actions. Although the following language regards regulations promulgated by the Interstate Commerce Commission, it is insightful when applied to *any* administrative agency. "[E]ven when . . . rulemaking represents a departure from [an] agency's prior position, so long as the policies it is pursuing can be discerned from its opinion, and those policies are consistent with congressional directives, we must defer to the . . . agency judgment." *Bessemer and Lake Erie Railroad Co., et al. v. Interstate Commerce Commission*, 691 F.2d 1104, 1110 (3d Cir. 1982).

Bessemer also held that "[t]he choice by an agency among alternative means for satisfying a statutory mandate is exclusively for that agency." *Bessemer*, 691 F.2d at 1110. Congress directed EPA through the Clean Air Act to promulgate regulations to meet NAAQS's in

nonattainment areas. The choice for a plantwide definition of source among several alternatives is exclusively for EPA; and the court has not demonstrated that the plantwide definition will not satisfy the required statutory mandate. Thus, the court must accord great deference to EPA's program adoption, yet has failed to do so.

Moreover, contrary to the imputation of the lower court, "[t]he agency is not absolutely bound by its prior determinations, but rather may adjust its policies and rulings in light of experience." *Montana Power Co. v. EPA*, 608 F.2d 334, 347 (9th Cir. 1979). "EPA is free to make reasonable changes in the interpretation of its regulations . . . ." *Montana Power Co. v. EPA*, 608 F.2d at 348. *See also Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 289 (D.C. Cir. 1981).

In order to have properly overturned EPA's nonattainment program using the plantwide definition, the court must have found the implementing regulations were arbitrary and capricious. *Baltimore Gas*, 51 U.S.L.W. at 4680.

> "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Association*, 51 U.S.L.W. at 4956.

The lower court relied on two of these factors to find the plantwide definition for air pollution source in nonattainment areas arbitrary and capricious. First, the court points primarily to economic considerations as a factor Congress intended EPA not to consider. On the contrary, EPA's consideration of economic factors was intended by Congress to be considered by EPA in meeting NAAQS's in nonattainment areas. *See* Arguments I and IV, *supra.*

The second basis found by the lower court for overturning the plantwide definition was EPA's failure to support its action with evidence. In Footnote No. 41 of the opinion below, Circuit Judge Ginsburg criticized EPA for not basing its October, 1981, amendment of its regulations on any "study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality in the aggregate." *NRDC v. Gorsuch,* 685 F.2d at 727. However, the court's statement ignored the facts articulated by EPA, 46 Fed. Reg. 50,768 (October 14, 1981), that comprehensive written comments with implementation examples were considered. "EPA believes that the examples provided by the commentators support its statement in the proposal that the dual definition impedes legitimate efforts to modernize existing plants. (*See, e.g.,* comments of Crown Zellerbach; Union Oil Corporation.)"

Additionally, EPA stated as of March, 1981, when it initially proposed the changes in the regulations, that it had reevaluated all of the arguments and facts on all sides

of the nonattainment issues and had concluded that the elimination of the dual definition requirement will remove a barrier to modernization of the nation's industrial base. 46 Fed. Reg. 50,768 (October 14, 1981). Such a conclusion of EPA, based upon comments and surveys from interested parties, reevaluation of all arguments on the issues, and its own expert judgment is not arbitrary and capricious.

As a side note, it is curious that the October, 1981, regulations were struck down due to a lack of evidence that the dual definition would retard growth and the plantwide definition would not adequately achieve ambient air quality standards. When promulgating the August 7, 1980, dual definition of source for nonattainment areas (45 Fed. Reg. 52,696 through 52,698 (August 7, 1980)), EPA failed to cite any study or survey supporting the definition's efficacy yet the court finds this fact of no interest. The court below was not at liberty to substitute its opinion for that of the agency, yet the above dichotomy suggests that this is precisely what the court did.

EPA's decision was based upon relevant considerations, did not run counter to the evidence before the agency, is plausible, and may be ascribed as the product of agency expertise. Based on these factors, the action of EPA cannot be considered arbitrary and capricious.

CONCLUSION

PLF respectfully submits that based on the foregoing arguments, the decision of the court below was contrary to the law and therefore is in error. The August 17, 1982, decision rendered by the United States Court of Appeals for the District of Columbia Circuit should be reversed and the regulations promulgated by EPA on October 14, 1981, should be reinstated. Such action by this Court will enable EPA and the states to more fully comply with the congressional mandates of the nonattainment provisions of the Clean Air Act.

August, 1983.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1983

CHEVRON U.S.A., INC.,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al.

AMERICAN IRON AND STEEL INSTITUTE et al.,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al.

WILLIAM D. RUCKELSHAUS, Administrator, Environmental Protection Agency,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF MAINE, STATE OF NEW JERSEY, STATE OF NEW YORK, STATE OF VERMONT, AND STATE OF WISCONSIN, AMICI CURIAE

October 28, 1983

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QUESTION PRESENTED

Whether the Clean Air Act permits EPA to waive new source review for new and modified facilities located within existing plants in nonattainment areas?

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INTEREST OF AMICI CURIAE

This brief is filed, amici curiae, jointly on behalf of the Commonwealth of Pennsylvania and States of Colorado, Connecticut, Maine, New Jersey, New York, Vermont, and Wisconsin, (hereinafter the "Amici") pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of Respondents Natural Resources Defense Council, *et al.* (hereinafter "NRDC"). Amici urge this Honorable Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

Petitioner EPA states that it adopted the new definition of "source" to add flexibility in the administration of the Act. Amici welcome flexibility in the administration of some Clean Air Act programs, but believe that, for sound reasons, Congress intended that the requirements of the nonattainment program (set forth in Part D of the Clean Air Act) be nationally uniform. The waiver of new source review for new and modified facilities at existing industrial plants results in weakened emission limits and reduced incentives for compliance. EPA's plantwide definition of "source" will reduce the scope of new source review in some localities. This will increase the pressure on other localities to similarly reduce new source review in order to compete for modernized facilities. Although EPA asserts that its plantwide definition of "source" is

a state option, the economic pressure to attract modernization capital will force most states to adopt this definition. New source review is not intended to be an economic mechanism whereby states compete with each other to attract modernization at existing industrial plants. Amici are not interested in achieving short term modernization at the expense of long term harm to the public health.

Petitioner EPA has argued that it has adopted the plant-wide definition of "source" on behalf of the states. EPA Brief at 2-3. While many states commented both positively and negatively when EPA's new definition was first proposed,[1] no states supported EPA's position after the lower court's decision was reached. The State and Territorial Air Pollution Program Administrators ("STAPPA"), representing the state air pollution program officials, and the Association of Local Air Pollution Control Officials ("ALAPCO"), representing local governmental air pollution program officials, have endorsed the Court of Appeals decision, and have urged EPA Administrator Ruckelshaus to accept this decision. See Appendices A and B. EPA's representation that the states generally support EPA's position, as expressed throughout in its brief, is erroneous.

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[1] Some of the comments which EPA cites in favor of the plant-wide definition were, in fact, qualified statements. See EPA Brief at 39, n.50.

ARGUMENT

I. Introduction

Amici adopt NRDC's analysis of the term "source" in the Clean Air Act, particularly as the term is used in Part D of the Act (relating to plan requirements for nonattainment areas). The history of the Act since 1970 indicates that Congress intended the term "source" to have a specific meaning and that Congress intended new source review of all new or modified major emitting facilities in nonattainment areas to be an important part of the program for attainment of national ambient air quality standards. Moreover, as NRDC explains, EPA's position jeopardizes expeditious attainment of the minimum national ambient air quality standards.

In addition, Amici assert that the Administrator's flexible plant-wide definition of "source" undercuts several purposes of the Clean Air Act when such a definition is permitted in nonattainment areas. The Administrator's position eliminates nationally uniform standards of review for new sources. It fosters undesirable competition among the states to attract new industry and expand existing industry at the expense of air quality; it inequitably favors the expansion of existing plants to the prejudice of new plants. For all these reasons, as well as those submitted by NRDC, the decision of the lower court should be affirmed.

II. EPA's Plant-Wide Definition of "Source" Insulates Some Sources From New Source Review

Amici disagree with EPA's view that the Clean Air Act provides discretion to the Administrator to define "source" as he chooses. EPA's view is based on the premise that Part D of the Act provides a flexible program for reaching attainment, i.e., that the states need not adopt all the elements of new source review if it is possible to reach attainment by other means. EPA Brief at 17-18. Amici submit that this premise is incorrect. The Act mandates uniform application of new source review in nonattainment areas.

Contrary to EPA's assertions that the legislative history of the 1977 Amendments is not helpful in determining the meaning of the term "source," it is clear from the legislative history that new source review was intended to apply to all new or modified facilities within existing plants. Congress was certainly aware of arguments that the adoption of stricter standards for such new or modified facilities locating in nonattainment areas would inhibit growth and discourage industries from locating in nonattainment areas.[2] Nevertheless, Congress adopted uniform new source review requirements which place special obligations for air pollution control on new or modified major emitting facilities located in nonattainment areas.

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[2] See 123 Cong. Rec. 16204 (1977) (remarks of Rep. Waxman), 4 Leg. Hist. 3055; 123 Cong. Rec. 16196 (1977) (remarks of Rep. Rogers) 4 Leg. Hist. 3036-3037.

In presenting the Clean Air Act Amendments of 1977 to the Senate, Senator Muskie commented:

> Thus, [under the offset ruling and Part D new source review requirements] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a new reduction from previous emission levels. 123 Cong. Rec. at §13702 (daily edition, August 4, 1977).

EPA may not adopt a scheme of new source review which excludes some new sources. Under EPA's plant-wide definition of "source," an owner can replace a dirty *old* source within an existing plant with an equally dirty *new* source and evade the requirements of Section 173, including the "lowest achievable emission rate" requirement and the statewide compliance requirement.[3] Under EPA's exclusion of new source review, no air pollution control equip-

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[3] Suppose an industrial plant were to replace a boiler. The old facility may have no modern air cleaning equipment, and would be labelled by the local air pollution control agency as "grossly polluting." The plant owner could replace the old boiler with a new boiler, with no modern air pollution control equipment. EPA has promulgated no new source performance standard for this category of source, therefore, Section 111 of the Act would not apply. Since the new boiler's emissions will be offset by the retirement of the old boiler, there will be no net air quality impairment, and indeed, there may be some improvement. Under EPA's plant-wide definition of source, the source owner need not install technology which meets the lowest achievable emission rate, and need not demonstrate compliance at other sources in the state.

ment need be installed at all, and unless a state or local rule mandates such installation.[4] EPA's plant-wide definition has widespread adverse ramifications for the states.

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[4] EPA states that a new or modified facility, nevertheless must meet new source performance standards, and implies that this level of the technological performance is similar to "lowest achievable emission rate." The language of the Act indicates that these two emission standards are not identical. Compare Section 111(a)(1), 42 U.S.C. §7411(a)(1) with Section 171(3), 42 U.S.C. §7501(3). Court decisions have indicated that new source performance standards are not technology forcing, but merely restate what is "adequately demonstrated" and currently "achievable." See *National Lime Association v. EPA*, 627 F.2d 416 (D.C. Cir. 1980). *Essex Chemical Co. v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

In addition, Congress required the "lowest achievable emission rate" for new sources precisely because Congress was dissatisfied with EPA's performance under the new source performance program. (See Section 111(f) of the Act, 42 U.S.C. §741'(f), wherein Congress mandated EPA to accelerate its schedule of promulgation of new source performance standards.) EPA, to date, has promulgated new source performance standards for only a small number of source categories. See 40 CFR Part 60. There are *no* new source performance standards for many categories of new sources, such as industrial boilers, coke oven batteries, volatile organic compound sources, etc. J.A. at 123. Despite EPA's representation that it is accelerating its schedule of adoption of new source performance standards, which representation was made in the Preamble to the final rulemaking (J.A. 106-07), EPA has adopted only nine new source performance standards since that time. See 47 Fed. Reg. 950 (January 8, 1982) for a list of over 50 new source performance standards which EPA has not adopted to date.

III. EPA's Definition of "Source" Improperly Creates Interstate Pressures To Weaken Emission Standards

The legislative history of the 1970 Act reflects a congressional intent to prevent interstate competition for new sources by requiring new sources in all states to meet technology based emission standards. This uniformity of new source review was a significant feature of the 1970 Act.[5] Similarly, uniform new source review under Part D of the 1977 Act prevents interstate and intercity competition for new facilities. Correctly applied, a state or local government would have no incentive to bargain away the public health of local communities.[6]

Many companies have industrial plants located in urban nonattainment areas. Such plants often have antiquated equipment which needs to be modernized. If a company with plants in several states decides to modernize a plant it could conduct a program of "forum shopping" among states. The capital investment and jobs associated with the installation of a new or modified facility are very attractive to many communities. Under EPA's plant-wide definition, a state or local government would have the option and the incentive to compete for the modernized plant by considering the new or modified facility not to be a new "source" and thereby offering more lenient emis-

[5] H.R. Rep. 1146, 91st Cong., 2nd Sess. 3 (1970).

[6] See discussion of new source review in nonattainment areas. H. Rep. No. 294, 95th Cong. 1st Sess. 210-17 (1977).

sion limits.[7] On the other hand, a state which insists on new source review under Part D (and its accompanying conditions for "lowest achievable emission rates" and statewide compliance) would be at a competitive disadvantage. By eliminating uniform new source review, EPA has turned emission controls into a new mechanism for economic competition between states, at the expense of improvement to air quality.

Further, EPA overstates the amount of discretion states and local governments actually have in adopting new source rules. If EPA adopts a rule that empowers state and local governments to adopt a plant-wide definition of "source" in their nonattainment plans, most state and local governments ultimately would be compelled to adopt such a definition. If a state or local government fails to adopt such a definition, it would lose economic growth to other areas in the country. Ironically, EPA's plant-wide definition forces states and local governments with high environmental standards to choose between reducing these standards in order to provide incentives for economic growth or losing potential industrial development. Congress never intended such a result.

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[7] This can be accomplished easily where there is no new source performance standard for the new or modified facility since the "lowest achievable emission rate" is not required under EPA's plant-wide definition. See note 4, *supra*.

IV. The Waiver of New Source Review for Certain Facilities at Existing Plants Would Hamper State Enforcement Programs

The new source review program for nonattainment areas also requires the owner of a new or modified major source to demonstrate statewide compliance at its other plants within the state. Section 173(3), 42 U.S.C. §7503(3). This provision was inserted in the Act to enhance enforcement by linking modernization with compliance at existing plants. EPA's plant-wide definition would allow a company with an existing plant in a nonattainment area to escape the requirement of statewide compliance for existing plants by not requiring new source review for all modernization projects. A replacement facility or modernization project that does not increase the plant's overall emissions would not be subject to new source review.

EPA has stated no public policy reason for making the statewide compliance requirement optional. The legislative history of the Act does not indicate this requirement is to be optional. Congress intended the new source review provisions of Section 173 to aid enforcement against existing plants. The House Report notes that this provision was necessary due to the number of large air pollution sources which had made an inadequate commitment to implement controls and

which were, in fact, delaying compliance. H.R. Rep. No. 95-294, 95th Cong., 1 Sess. (1977) at 210-213.[8]

This provision has been very effective in forcing operators of existing plants to comply with the Act's provisions in a timely manner. For instance, companies within the steel industry which had not complied with the 1970 Act by the original attainment deadlines,[9] entered into several comprehensive consent decrees that resolved existing compliance problems and at the same time allowed for modernization.[10] The practical advantages of this provision of Section 173 of the Act are obvious. A plant which desires to modernize must reach a settlement on existing problems. A voluntary settlement between a company and the government leads to speedier compliance because the delays and expense of litigation are avoided.

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[8] Indeed the House Report found that: "Unless these noncompliance problems are corrected, the nonattainment problem will persist and grow more serious." *Id.* at 211.

[9] As the Seventh Circuit observed "much of the Congressional concern over delays in meeting ambient air quality standards was directed at the failure of the [steel industry intervenors in this case] to reach compliance." *United States Steel v. EPA*, 605 F.2d 283, n.5 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980).

As the House Report noted:

> The committee is also mindful of the fact that several categories of major polluters have not complied with emissions limits in nonattainment areas. The 1975 subcommittee hearings reflect this disturbingly high incidence of noncompliance.

H. Rep. No. 294, 95th Cong. 1st Sess. 210-11 (1977).

[10] See summary of EPA settlements with Republic Steel Corp. and United States Steel Corp. at 9 Envir. Rptr. 1123 and 10 Envir. Rptr. 119.

EPA may argue that its plantwide definition of "source" does not preclude states from retaining the statewide compliance requirements of Section 173 in its state implementation plan. Practically speaking, this is not an option that is easy for a state to exercise when it is faced with losing a modernization project to a competing state which does not require the company to clean up its other existing plants.

V. Application of EPA's Definition Would Reduce the Amount of Air Resources Available for New Sources

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One of the results of imposing the new source review requirement for new or modified major emitting facilities is to make air resources available for other new facilities. If older facilities are retired and replaced with equally polluting new facilities, no real progress is made toward attainment and no air resources are available for new growth. Existing plants will have consumed any margin for growth.

In *ASARCO v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), the District of Columbia Court of Appeals quite aptly described this problem in considering a plantwide definition of "source" under the new source performance standards program.

> Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements. The "best" pollution control technology would never have to be installed, and existing

> plants would use up much of the available clean air, inhibiting construction of new plants (which would comply with the NSPS). 578 F.2d at 329-30 n. 40.

A similar problem exists for nonattainment areas if EPA's definition of "source" is upheld. Existing plants could prevent the introduction of new plants in a nonattainment area by replacing older facilities with new facilities that do not meet the "lowest achievable emission rate".

Congress was aware of this problem, and mandated the "lowest achievable emission rate" for new facilities "in order to permit room for maximum potential economic growth". H.R. Rep. 95-294, 95th Cong. 1st Sess. 215 (1977). By reducing the amount of air resources a new facility consumes more air resources can be made available to other prospective industries. If an old boiler which emits 400 tons of sulfur dioxide per year is retired, and is replaced with a new boiler which emits 400 tons, no net benefit accrues to air quality.[11] However, if the old boiler is replaced with a new boiler that complies with the lowest achievable emission rate and emits 50 tons of sulfur dioxide per year, the air pollution load is reduced by 350 tons. This reduction can either be used for other new facilities or can be used in the general program for attaining the national ambient air quality standards.

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[11] In fact, as NRDC correctly asserts, under EPA's plant-wide definition, a new facility may increase total plant-wide emissions, since "de minimis" increases in emissions are not subject to new source review.

New source review under Part D of the Act was intended to promote long term improvement in air quality by forcing the installation of better pollution controls along with plant modernization.[12] EPA may be able to show that, in individual cases, plant modernization without new source review (and its accompanying conditions) may result in some marginal improvement in air quality. EPA is willing to accept half-steps toward attainment of air quality goals instead of the more stringent measures mandated by Congress through the requirement of new source review. However, other than by mere assertion, EPA has not shown that the additional air quality improvement which results from the "lowest achievable emission rate" requirements and other requirements of full new source review do not accrue to the long term benefit of the public.[13]

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[12] See ALAPCO letter, Appendix B: "Replacement of old high-polluting sources with new low-polluting sources constitutes a significant portion of plans for the enhancement of air quality in nonattainment areas. Many areas are dependent upon a projection of reductions in emissions to be obtained through the new source review program."

[13] The lower court found no support in the record for EPA's conclusion that, in the aggregate, air quality would be improved at a more expeditious pace under the rescinded rule. *Natural Resources Defense Council v. Gorsuch*, 685 F.2d at 727, n.41.

CONCLUSION

For the reasons put forth above, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,
Commonwealth of Pennsylvania
By: LEROY S. ZIMMERMAN
Attorney General
THOMAS Y. AU*
Assistant Counsel
Department of
Environmental Resources
State of Colorado,
By: DUANE WOODARD
Attorney General
RICHARD L. GRIFFITH
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State of Connecticut,
By: JOSEPH I. LIEBERMAN
Its Attorney General
State of Maine,
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State of New Jersey,
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Attorney General
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Assistant Attorney Gen
State of Wisconsin,
By: BRONSON C. LA FOLLETTE
Attorney General

APPENDIX A

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS
444 N. Capitol St., NW Washington, DC 20001
202-624-7864

July 8, 1983

William Ruckelshaus
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Ruckelshaus:

The State and Territorial Air Pollution Program Administrators (STAPPA) would like to make its position clear relative to the Environmental Protection Agency's revision to the definition of source as it applies to nonattainment areas.

We are concerned that the October 1981 change in definition of source may needlessly increase emissions in areas violating the primary national ambient air quality standards (NAAQS) and jeopardize the potential for achieving the NAAQS in these areas. We do not know if the October 1981 change is consistent with the statutory requirements of the Clean Air Act and therefore, will not discuss those issues in this letter.

The air quality needs of areas violating the health-related NAAQS are different from those in

Prevention of Significant Deterioration (PSD) areas. In nonattainment areas, there is a need to *reduce* emissions while, in PSD areas, the emphasis is on limiting *increases* in emissions. Making the nonattainment definition of source identical to that used in PSD areas will make it more difficult to obtain the emission reductions necessary to assure attainment of the NAAQS. The reasons for this are discussed below.

The PSD program definition of "significant" exempts from the new source review increases in emissions up to 40, 25 and 40 tons per year for sulfur dioxide (SO_2), total suspended particulates (TSP) and volatile organic compounds (VOC) sources, respectively. Although these levels of emissions may be "insignificant" in areas attaining standards, this is not the case in many nonattainment areas. In most TSP and VOC nonattainment areas and some eastern SO_2 nonattaiment areas, the violations of the NAAQS result from the cumulative impact of all sources in the nonattainment area. Allowing even the PSD significant level increases from new and modified sources would further burden already overburdened atmospheres and *require corresponding reductions from existing sources.*

Further, the October 1981 definition of source would exempt some sources from the nonattainment area control technology requirements (BACT and LAER) based on the rationale that the New Source Performance Standards (NSPS) would assure use of the most up-to-date pollution control technology. This rationale is flawed because NSPS have not been promulgated for a large number of major air pollution sources (for example, coke ovens, industrial boilers and numerous VOC source categories). Additionally, this

definition of source is structured so that the exempt sources would not even be subject to the reasonably available control technology (RACT) requirements of Section 172(b)(2) of the Clean Air Act.

Exempting sources from the control technology requirements and allowing PSD emission increases while attempting to solely rely on the reasonable further progress (RFP) provision as the measure of success of the Part D plans may be inadequate to assure expeditious attainment. The current Part D State Implementation Plan control strategies are based, in many cases, on rudimentary emission–air quality relationships (ozone) and plans for further study of the nonattainment problem (TSP). As a result, there is considerable uncertainty regarding the adequacy of the amount of emission reductions necessary to achieve some health-related standards. This ambiguity makes the Part D RFP plans in many cases tenuous at best. In addition, the RFP demonstrations are an "after-the-fact" evaluation of progress. In most cases, they are based on emission inventories that lag by two years or more. Because of this time lag, numerous new and reconstructed sources may be built with lenient or no controls before it is realized that the Part D plans may not be adequate to attain the NAAQS. Ultimately, this may result in the costly retrofitting of better controls on those new and reconstructed sources originally exempt from the new source review.

STAPPA believes that it is appropriate to revise the October 1981 definition of source as it applies to nonattainment areas and revert to the August 1980 dual source definition. Reverting to the dual source definition of source could prevent the construction of

uncontrolled process equipment in nonattainment areas, could prevent increased levels of air contaminants in nonattainment areas and could provide for expeditious attainment of the health-related primary ambient air quality standards.

Sincerely,
/s/ Randolph Wood
Randolph Wood
President

APPENDIX B

ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS
444 N. Capitol St. NW, Washington, DC 20001
202-624-7864

July 18, 1983

William Ruckelshaus
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Ruckelshaus:

This letter is written on behalf of the national Association of Local Air Pollution Control Officials (ALAPCO) to express our position concerning the definition of "stationary source" and the case pending before the Supreme Court. ALAPCO is opposed to the position taken by the U.S. Environmental Protection Agency and industry petitioners in their suit against the Natural Resources Defense Council on this issue. We believe that the term "stationary source" should be defined as any individual process or activity capable of emitting an air pollutant.

ALAPCO members feel that the new source review process through the establishment of modern, well-controlled sources, is a vital element of the plan for clean air for the future. Replacement of old high-polluting sources with new low-polluting sources con-

stitutes a significant portion of plans for the enhancement of air quality in nonattainment areas. Many areas are dependent upon a projection of reductions in emissions to be obtained through the new source review program. If these reductions are not realized, then we face the prospect of revisiting for the third time existing sources for emissions reductions. It seems a more sound process to adopt a process-specific definition of source and apply tight controls to each new source at the time of installation.

Furthermore, we believe that the adoption of a plant-wide definition of source in nonattainment areas is contrary to the intent of Congress and the letter of the law as expressed in Section 173 of the Clean Air Act. This section places four provisions on the construction of new or modified stationary sources in nonattainment areas. These are:

- that allowable emissions from the new source combined with allowable emissions from existing sources in the region and with emissions from non-major new sources installed without offsets are sufficient, so as to assure that the region is maintaining reasonable further progress toward attainment of the applicable standards;
- that the proposed source will achieve the lowest achievable emission rate (LAER);
- that all existing sources under the ownership of the proposed new source are in compliance or on an acceptable schedule for compliance; and
- that the applicable implementation plan in the state is being carried out.

Under the plant-wide definition, an installation could be accomplished without meeting even one of the four requirements.

Since the original establishment of its Clean Air Act positions, the ALAPCO organization has called for the application of "Best Available Control Technology" (BACT) on all new sources which emit at least 50 tons of pollutants per year. We feel that the BACT requirement should be applied nationwide in both attainment and nonattainment areas. The provision of a BACT requirement nationwide would aid in the pursuit of the following New Source Review goals: to minimize the consideration of air pollution rules in the interstate competition for industry, to enhance the potential for long-term economic growth through preservation of existing air quality, and to ensure that controls are applied at the time of least cost. The process-specific definition of source is necessary to assure progress toward the attainment of these goals.

If you have any questions about our position on this matter, please do not hesitate to contact me.

Sincerely,
/s/ Donald R. Arkell
Donald Arkell, President
Association of Local Air
Pollution Control Officials

cc: ALAPCO Board of Directors

MOTION FILED
OCT 21 1983

Office - Supreme Court, U.S.
FILED
OCT 21 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1005, 82-1247, 82-1591

IN THE

Supreme Court of The United States

October Term, 1983

CHEVRON U.S.A., INC.,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents;

AMERICAN IRON AND STEEL INSTITUTE, et al.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et. al.,
Respondents;

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC

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NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION TO FILE BRIEF AMICUS CURIAE FOR UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC

The United Steelworkers of America, AFL-CIO-CLC (Union) requests that this Court grant this Motion to file a brief *amicus curiae* in support of respondent Natural Resources Defense Council (NRDC) for the following reasons.

1. Statement of Interest

The Union is a labor organization which represents close to one million workers in the United States and Canada. Approximately 250,000 of our members are employees of corporations that belong to petitioner American Iron and Steel Institute. Most of these members and their families, together with substantial numbers of other Union members and their families, live in areas of the country where the air quality violates one or more of the national ambient air quality standards in part because of air pollution from iron-and steelmaking operations.

Moreover, the Union was a leading force in the efforts to enact the Clean Air Act (the Act) (42 U.S.C. §§ 7401 et seq.) and has continued to be active in the efforts to obtain compliance with the requirements of the Act by a number of industries, including the steel industry. To that end, the Union, in conjunction with the Environmental Protection Agency (EPA) and various environmental groups such as respondent NRDC played a primary role in the development and passage of the Steel Industry Compliance Extension Act of 1981 (Pub. L.No. 97-23, 95 Stat. 139 (1981)) (the Extension Act) which amended the Clean Air Act to extend compliance deadlines in return for modernization of operations in the steel industry. Our support of such an extension was based on the premise that modernization of the steel industry would benefit not only the long-term employment prospects of our members by providing a more competitive industry, but also benefit their health and that of their families in the surrounding communities since the new, modern projects would meet existing air pollution control requirements.

2. Issue to be Presented

The purpose of our brief *amicus curiae* is to focus particular attention on the conflict between the plantwide definition of source now espoused by EPA, and the Extension Act amendments extending the compliance deadlines for the steel industry. Those amendments were premised on a definition of source for nonattainment areas that included as "sources" units of operation or production built within existing plants as well as such units built at new sites. This issue will not be adequately addressed by petitioners EPA and the American Iron and Steel Institute since they now support the plantwide definition of source at issue here. Respondent NRDC, while a party to the negotiations surrounding the Extension Act amendments, is more concerned with the relationship of the changed definition of "source" to the Clean Air Act in general rather than to the specific development of the Extension Act. Moreover, NRDC lacks the unique perspective of the Union whereby the Union sought to provide immediate relief to the steel industry so that the capital funds made available could be used for modernization with the assurance that the new projects would improve air quality in the nonattainment areas where many of the Union's members and their families live.

3. Statement of Consent or Objection

On September 19, 1983, counsel for the Union requested from counsel of record for petitioners and respondents, their written consent or objection to the filing of the Union's brief *amicus curiae*. Consent was obtained from the Federal government parties and NRDC. Petitioner Chevron objected to the filing unless a draft brief was submitted in advance. Since no brief was so submitted, Chevron's response was considered an ob-

jection to the filing of this brief. Responses were not received from any other parties.

WHEREFORE, for the reasons set forth above, the Union requests that this Motion to file a brief *amicus curiae* be granted.

Respectfully submitted,

MARY-WIN O'BRIEN
Assistant General Counsel
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222
Phone: 412-562-2531

Dated: October 19, 1983

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ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY
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NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE FOR UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC

STATEMENT OF INTEREST OF AMICUS CURIAE

The United Steelworkers of America, AFL-CIO-CLC (Union) is a labor organization which represents close to one million workers in the United States and Canada. Approximately 250,000 of our members are employees of corporations that belong to petitioner American Iron and

Steel Institute. Most of these members and their families, together with substantial numbers of other Union members and their families, live in areas of the country where the air quality violates one or more of the national ambient air quality standards in part because of air pollution from iron-and steel-making operations.

Moreover, the Union was a leading force in the efforts to enact the Clean Air Act (the Act) (42 U.S.C. §§ 7401 et seq.) and has continued to be active in the efforts to obtain compliance with the requirements of the Act by a number of industries, including the steel industry. To that end, the Union, in conjunction with the Environmental Protection Agency (EPA) and various environmental groups such as respondent, Natural Resources Defense Council (NRDC), played a primary role in the development and passage of the Steel Industry Compliance Extension Act of 1981 (Pub. L.No. 97-23, 95 Stat. 139 (1981)) (the Extension Act) which amended the Clean Air Act to extend compliance deadlines in return for modernization of operations in the steel industry. Our support of such an extension was based on the premise that modernization of the steel industry would benefit not only the long-term employment prospects of our members by providing a more competitive industry, but also benefit their health and that of their families in the surrounding communities since the new, modern projects would meet existing air pollution control requirements.[1]

---

1. As Congressman Doug Walgren stated:

> Under this legislation, the same environmental goals will be met as under the present law but the investment required will be able to be coordinated with new production facilities. Therefore, there is no loss whatsoever from an environmental viewpoint.

127 Cong. Rec. H2446 (daily ed. May 28, 1981).

The purpose of this brief is to focus particular attention on the conflict between the plantwide definiton of source now espoused by EPA, and the Extension Act amendments extending the compliance deadlines for the steel industry. Those amendments were premised on a definition of source for nonattainment areas that included as "sources" units of operation or production built within existing plants as well as such units built at new sites.

SUMMARY OF ARGUMENT

The development and passage of the Extension Act, which amended the Clean Air Act to defer certain compliance deadlines for the steel industry in return for a commitment to modernization was the result of negotiations by the industry, the Union, EPA and environmental groups such as respondent NRDC. A key principle underlying those negotiations was that the modernization projects built in nonattainment areas would meet the requirements for new source review. Moreover, the types of sources that were at issue and were identified by Congress were production units within a steel plant, e.g., coke ovens, blast furnaces and continuous casters, not entire plants. EPA's subsequent regulations have undermined that consensus by changing the definition of source to apply only to entire industrial plants.

ARGUMENT

The genesis of the Extension Act, its statutory language, and legislative history make clear that the pro-

duction unit definition of source, as opposed to the plant-wide definition, was no accident nor was it incidental to the passage of the Extension Act.[2] "The bill reflects an historic agreement hammered out last September between representatives of the steel companies, the steelworkers union, ... the environmental groups, and the Environmental Protection Agency." 127 Cong. Rec. H2449 (daily ed. May 28, 1981) (remarks of Congressman John Dingell).

This agreement was especially unusual in that it was the culmination of an extended bargaining process among four very disparate groups.[3] Through this process, these four participants achieved a consensus that resulted in the passage of the Extension Act.[4] The essence of this agreement was that the steel industry,

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2. That passage reflected a "carefully crafted agreement reached by industry, labor [the Union], environmental groups and EPA." 127 Cong. Rec. H2447 (daily ed. May 28, 1981) (remarks of Congressman Doug Walgren), to "achieve healthy air through a flexible system of modernization supervised by the judicial system." S.Rep. No. 97-133, 97th Cong., 1st Sess. 3 (1981).

3. The Extension Act was based on the recommendations of the Steel Tripartite Committee as one part of a program to address the fundamental problems of the steel industry. H.R. Rep. No. 97-121, 97th Cong., 1st Sess. 2 (1981), reprinted in 1981 U.S. Code Cong. & Admin. News 57. The members of the Committee, in conjunction with representatives from environmental groups, developed the legislative proposal that formed the basis for the Extension Act. 127 Cong. Record S6986 (daily ed. June 25, 1981) (remarks by Senator Randolph).

4. BNA Environment Reporter May 8, 1981, Vol. 12, No. 2 at 60 and July 3, 1981, Vol. 12, No. 10 at 307. "Unusual Alliance Seeking to Postpone Pollution Curbs on Steel Industry," *New York Times*, March 4, 1981, at A-30, Col. 3.

which contended it had a short-term capital shortage, would be allowed a three-year extension of the deadline for compliance with some pollution control requirements on the condition that the money saved by this deferred compliance was invested in the modernization of steelmaking operations, with the modernization being carried out under the then existing conditions for new source review. One of the key factors in such review is the application of the lowest achievable emission rate technology (LAER). The LAER requirement is one of the specific conditions new and modified "sources" must meet in order to obtain a permit under §173 of the Clean Air Act (42 U.S.C. § 7503). Since the parties to the bargaining process and Congress recognized the applicability of LAER to the modernized production units that were to result from the extension, this Court should reject EPA's belated attempt to renege on one of the fundamental premises that precipitated the cooperative agreement of these disparate groups.

In issuing a statement regarding his new steel industry program, President Carter emphasized compliance with environmental laws:

> But modernization is equally important to environmental objectives, since modern facilities are inherently much cleaner, and *all parties (including the industry) have agreed they will use the most modern technology available.*

Hearings on H.R. 1817, 2024, 2219, 2055, and 2286 Before the Subcommittee on Health and Environment of the House Committee on Energy and Commerce, 97th Cong., 1st Sess. 130 (1981). (emphasis added).

John J. Sheehan, Legislative Director, representing the Union at the bargaining table, reiterated the understanding that modern technology meant LAER:

> Furthermore, the amendment fosters the continued imposition of reasonably available control technology for existing sources and emission limitations requirements of applicable implementation plans, *including technology to achieve lowest emission rates for new facilities.*

Id. at 82 (emphasis added).[5]

Finally, in testifying before the Senate Committee, Frances Dubrowski, a senior staff attorney at the Natural Resources Defense Council (NRDC) stated:

> Fourth, the company would have to agree to meet all applicable clean air requirements by the new compliance deadline. *This would include attaining the lowest achievable emission rate (LAER) on the new facilities and installing reasonably available control technology (RACT) on existing facilities.*

Hearings on S.63 Before the Senate Committee on Environment and Public Works, 97th Cong., 1st Sess. 92 (1981) (emphasis added). See also Hearing on H.R. 1817, supra at p. 86.[6]

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5. As Union President Lloyd McBride testified when the Steel Tripartite Committee made its report to Congress in 1980, the application of LAER to the new facilities was viewed as an important prerequisite for growth in steel-making communities. Hearing Before the Senate Committee on Environment and Public Works, 96th Cong., 2d Sess. 51 (1980).

6. Although the steel industry issued no direct statement regarding LAER, they voiced no opposition to the above-quoted statements. This silence is important since as part of the agreement under which the parties sought the compliance extension for the steel industry, the industry, through the chief executive officers of the major steel companies, gave assurances "that a stretchout of the compliance deadlines was all the relief the industry would either need or seek from the health protective requirements of the Clean Air Act." *Id.* at 85, 91, 96.

Congress demonstrated full awareness that LAER would apply to production units as part of new source review and not to whole plants. Specifically, Congress stated:

> [The] program to modernize facilities will also continue to include the application of lowest achievable emission rate technology (LAER) on the modernized facilities. LAER is required for any new, modified, or reconstructed major facility in a nonattainment area.

H.R. Rep. No. 97-121, 97th Cong., 1st Sess. 12 (1981), reprinted in 1981 U.S. Code Cong. Admin. News 63.

Both the statutory language and the legislative history of the Extension Act clearly reflect this Congressional intent to treat as stationary sources major units of production within iron-and steel-making operations not just entire plants. For example, in setting out the conditions necessary to obtain an extension, Congress required that there must be a compliance schedule "for each stationary source at all such person's iron-and steel-producing operations . . . " 42 U.S.C. § 7413(e) (1) (C). Iron-and steel-producing operations were defined to include "production facilities for iron and steel, as well as associated processing, coke making and sintering facilities." (42 U.S.C. § 7413(e) (2)).[7] Both of these statutory

7. While the "sources" referred to in this section of the Extension Act are existing sources which do not need to meet the compliance requirements for new sources, they are located within steel plants in nonattainment areas and therefore reveal the Congressional understanding that the term "source" includes units of production within steel plants rather than the plant as a whole.

provisions support the position that Congress intended the term "source" to mean something other than an entire iron-and steel-making plant, namely the various production units within that plant.

Moreover, the legislative history of the Extension Act clearly reflects Congressional intent to treat as stationary sources major units of production, not entire plants. The House Report of the Extension Act states that the House proposal was intended to "encourage additional capital investments in steelmaking operations." H.R. Rep. No. 97-121, *supra* at p. 63. By "steelmaking operations" Congress envisioned the various production units comprising the plant. The Report specifies examples of projects that could result from such investments:

> It is anticipated that the industry will use the opportunity to modernize the American steel industry by building modern *continuous casters*, converting *open hearth shops* to *basic oxygen furnace operations* or undertaking similar projects to improve the competitive posture of the industry.

Id. (emphasis added.) It is evident from this statement that Congress relied on a unit definition of source, not a plant-wide definition.[8]

According to the above-quoted House Committee Report, continuous casters, basic oxygen furnaces, and coke ovens (which are examples of the intended modernization projects) are subject to LAER. Only new and modified "sources" are subject to LAER. Therefore, continu-

---

8. Further, in expressing his support for the Extension Act, Congressman Adam Benjamin cited the construction of a new continuous caster and the modernization or replacement of coke ovens as potential modifications provided for by this legislation. 127 Cong. Rec. H2448 (daily ed. May 28, 1981).

ous casters, basic oxygen furnaces, coke ovens, and other like units are "sources." There is no way to reconcile EPA's adoption of a plant-wide definition of "source," which exempts such units from LAER and other permit requirements, with the genesis of the Extension Act, its statutory language or its legislative history.

CONCLUSION

The development of the 1981 Steel Industry Compliance Extension Act undeniably reveals that Congress understood the law to be, and to remain, that a "source" is a unit within a plant (such as a basic oxygen furnace), not the plant itself. EPA's subsequent adoption of the plant-wide definition of source is totally inconsistent with this understanding and thus violates a key premise relied on by the Union in its support of the passage of the Extension Act.

Respectfully submitted,

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MARY-WIN O'BRIEN
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 1983, I served three (3) copies of the enclosed Motion for Leave to File Brief *amicus curiae* and Brief *amicus curiae* by first class mail, postage prepaid, to the following counsel:

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MARY-WIN O'BRIEN

No. 82-1005-CFX
Status: GRANTED

Title: Chevron U.S.A. Inc., Petitioner
v.
Natural Resources Defense Council, Inc., et al.

Docketed:
December 15, 1982

Court: United States Court of Appeals for
the District of Columbia Circuit

Vide:
82-1247
82-1591

Counsel for petitioner: Salinsky, Michael H., Emmet, Robert A.

Counsel for respondent: Doniger, David P., Tosi, Louis E., Lettow, Charles F., Barald, Patricia Anne, Emmett, Robert A., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 15 1982	G	Petition for writ of certiorari filed.
3	Dec 27 1982		Order extending time to file response to petition until February 14, 1983.
5	Jan 21 1983		Order extending time to file response to petition until April 25, 1983.
7	Apr 20 1983		Order extending time to file response to petition until April 29, 1983.
8	Apr 29 1983		Brief of respondent NRDC, et al. in opposition filed. VIDED.
9	May 4 1983		Reply brief of petitioner Chevron U.S.A., Inc. filed.
10	May 4 1983		DISTRIBUTED. May 19, 1983
12	Mar 28 1983	G	Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae filed.
14	May 23 1983		REDISTRIBUTED. May 26, 1983
16	May 31 1983		Motion of Mid-America Legal Foundation for leave to file a brief as amicus curiae GRANTED.
17	May 31 1983		Petition GRANTED. This case is consolidated with case No. 82-1247 and 82-1591, and a total of one hour is allotted for oral argument.
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19	Jul 8 1983		Order extending time to file brief of petitioner on the merits until August 15, 1983.
20	Jul 28 1983		Order further extending time to file brief of petitioner on the merits until August 31, 1983.
21	Aug 17 1983		Brief of petitioner Chevron U.S.A., Inc. filed. VIDED.
22	Aug 30 1983		Joint appendix filed. VIDED.
23	Aug 29 1983		Brief amicus curiae of Pacific Legal Foundation filed. VIDED.
24	Aug 29 1983		Brief of petitioners in No. 82-1247, Am. Iron and Steel Institute, et al. filed. VIDED.
25	Aug 31 1983		Brief of respondent Administrator of the EPA filed. VIDED.
26	Sep 7 1983		Brief amicus curiae of Mid-America Legal Foundation filed. VIDED.
28	Sep 13 1983		Certified original record (Box) received.
29	Sep 13 1983		Record filed.
31	Sep 15 1983		Order extending time to file brief of respondent on the merits until October 21, 1983.
32	Oct 18 1983		Order further extending time to file brief of respondent on the merits until October 28, 1983.
33	Oct 21 1983	G	Motion of United Steelworkers of America, AFL-CIC-CLC, for leave to file a brief as amicus curiae filed.

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Entry	Date	Note	Proceedings and Orders
34	Oct 31 1983		Motion of United Steelworkers of America, AFL-CIC-CLC, for leave to file a brief as amicus curiae GRANTED.
35	Oct 28 1983		Brief of respondents NRDC, et al. filed. VIDED.
36	Oct 28 1983		Brief amicus curiae of Pennsylvania, et al. filed. VIDED.
37	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 29, 1984. This case is consolidated with Nos. 82-1247 & 1591. (4th case)
38	Jan 11 1984		CIRCULATED.
39	Feb 17 1984	X	Reply brief of petitioner EPA filed. VIDED.
40	Feb 18 1984	X	Reply brief of petitioner Chevron U.S.A., Inc. filed. VIDED.
42	Feb 22 1984	X	Reply brief of petitioners Amer. Iron & Steel Inst., et al. filed. VIDED.
43	Feb 29 1984		ARGUED.